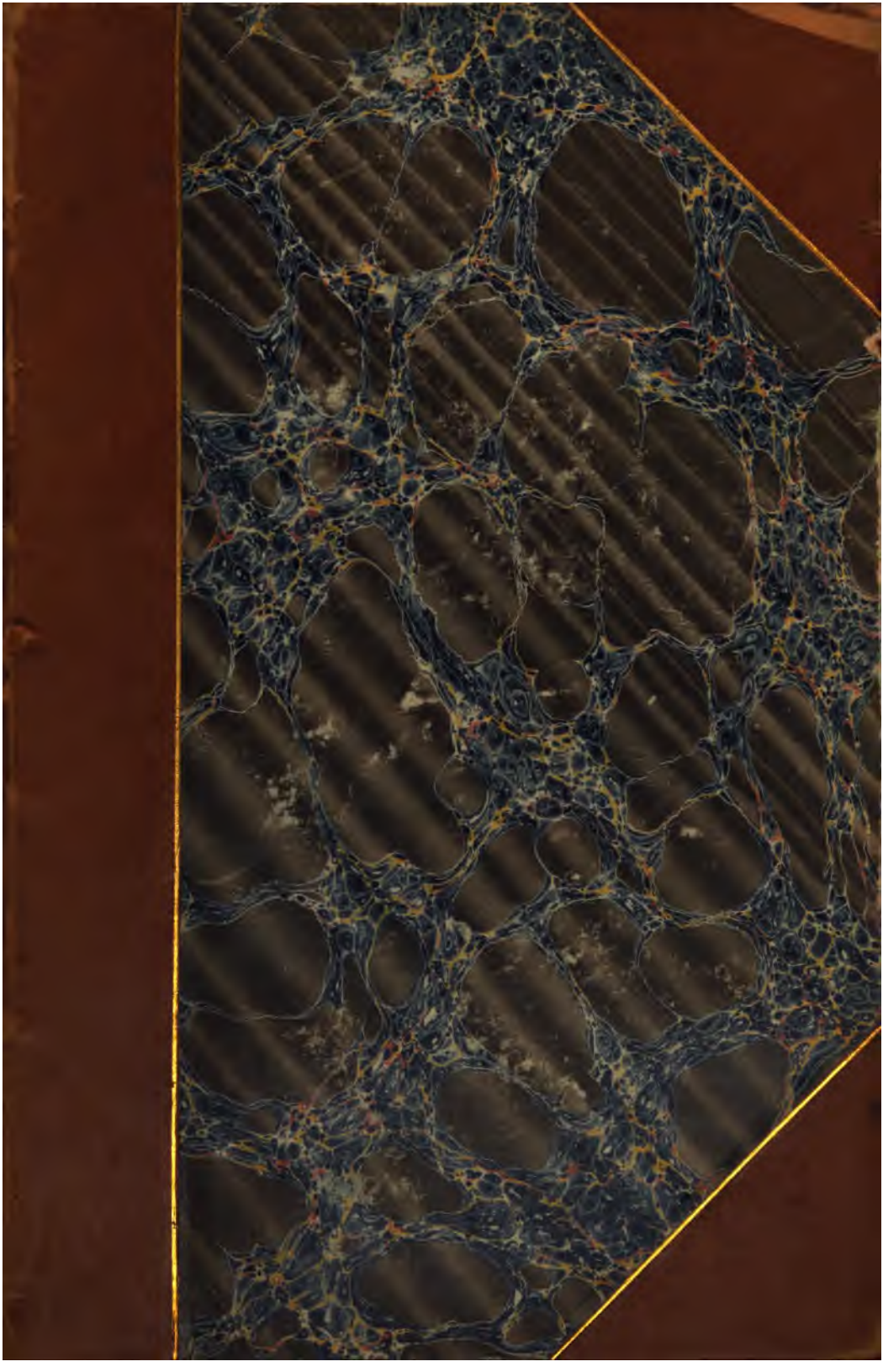
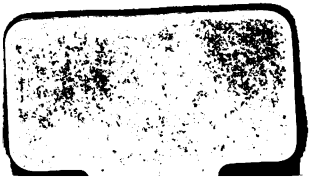


44. 1572.



Ex dono Victoris

A

# LETTER

TO THE RIGHT HONOURABLE

## THE LORD BROUGHAM AND VAUX,

&c. &c. &c.

ON THE

## Opinions of the Judges

IN

## THE IRISH MARRIAGE CASES.

WITH

AN APPENDIX,

CONTAINING THE OPINIONS OF THE JUDGES, &c.


---

BY

SIR JOHN STODDART, KNT., LL.D.

LATE CHIEF JUSTICE OF MALTA.

LONDON:

HENRY BUTTERWORTH,

Law Bookseller and Publisher,

7, FLEET STREET.

1844.

LONDON:
C. ROWORTH AND SONS, BELL YARD,
TEMPLE BAR.

# A LETTER,

*&c.*

My Dear Lord,

I have perused, with great attention, the parliamentary paper, which your Lordship was so kind as to communicate to me. (H. L. 1843, 171.) I collect from it, that the House of Lords had propounded to the learned judges of the common law certain questions, on the legality of two convictions, which took place in Ireland, for bigamy; and that the unanimous opinion of those venerable persons was, that the convictions could not be sustained. From so high an authority, on such a point, it is not for me to dissent. But far the greater part of the paper is occupied with the reasoning of the Lord Chief Justice of the Common Pleas, on a preliminary question, of a more general and abstract nature. It is to this reasoning (for which, it appears, the other learned judges "are not to be held responsible" (Opins. p. 15)), that I venture, with great deference, to call your Lordship's particular attention.

Your Lordship, I am sure, will readily believe, that I share with yourself, and with the whole legal profession, a profound respect for the great talents and attainments, which the Lord Chief Justice has ever displayed, as well at the bar as on the bench. Many years ago, I had a personal opportunity to witness them, in a remarkable case, before the Privy Council, which was argued by his Lordship (then Mr. Tindal) for the Hudson's Bay Company, and by myself for the Earl of Selkirk. And of his Lordship's

antiquarian knowledge of the common law, his celebrated speech, at the bar, on trial by battle, will ever remain a memorable example.

I should therefore feel, that I was acting with inexcusable rashness, were I to presume to question any doctrine *purely* of the common law, in opposition to the *clear* and *decided* authority of so experienced a jurist. But the point, which I propose to examine, is of a very different kind. The Chief Justice considers separately the question, "What was the nature and obligatory force of a contract of marriage, *per verba de præsenti*, by the English common law, previous to the passing of the Marriage Act, 26 Geo. II.?" (Opins. p. 1.) Now this, as I shall presently show, far from being *purely* a common law question, is one that depends for its resolution, primarily and essentially, on the law of the Ecclesiastical Courts, in which I had for many years the honour of practising: and the Chief Justice not only does not deliver a *clear* and *decided* opinion on it, but he expressly declares, that it is one "involved in much "obscurity," nay, "in still deeper obscurity now, than in "the time of his predecessors" (Opins. p. 1); that it was "only after considerable fluctuation and doubt, in the minds "of some of his brethren, that they acceded to the opinion "formed by the majority" (Opins. p. 2); and particularly with reference to the law of the Ecclesiastical Courts (which I conceive to be the most important branch of the inquiry), he says, he is only able to state "the result of a somewhat "*hasty* consideration of authorities, for the due research "into which, he and his learned brethren were anxious to "have obtained a longer time." (Opins. p. 11.)

My Lord, uncertainty in the principles of the law must inevitably lead to evils in the practice. *Misera servitus est, ubi jus vagum et incognitum.* In the present instance, an uncertainty in the law of marriage has wrought much misery to individuals, and spread alarm through large

classes of the community. If my professional studies have lain among authorities calculated to throw light on a subject so mischievously obscure, it may be thought, in some sort, my duty to bring the fruits of my research to the notice of learned persons, to whom they are necessarily less familiar.

I own that I have a motive, which your Lordship will easily appreciate, of a more personal nature. The argument of Sir Nicholas Tindal, as I view it, tends to impugn the judgment of the late LORD STOWELL in the case of *Dalrymple* v. *Dalrymple* (1811). The memory of that highly gifted personage I have every reason to venerate. For many years I had the honour of pleading before him, in the Consistory, the Admiralty, and the Privy Council. If it were not too presumptuous, I might say of him as Lord Mansfield did of Lord Hardwicke, "it was impos- "sible to attend him so long, to sit under him every day, "without catching something of his light." And finally, it was on his recommendation, that I was placed at the head of the legal department at Malta, where I continued, for nearly thirteen years, to administer a system of jurisprudence, with which both the civil and canon law were closely interwoven.* As to the case of Dalrymple, I was counsel in it from first to last; and in the court of *dernier resort*, I had the honour to be associated with your Lordship.

Of Lord Stowell's deservedly celebrated judgment I shall speak more fully hereafter. At present I shall only observe, that in reference to the period between the Reformation and the Marriage Act of 1753, he says, "that the "Ecclesiastical Courts of this country, which had the "cognizance of matrimonial causes, enforced that rule of

* How far my performance of those high duties proved satisfactory to your Lordship, I am precluded from stating, by the panegyric, which you were pleased to pronounce on it in the House of Lords, in the year 1839.

" the Canon Law, which held an irregular marriage, con-
" stituted *per verba de præsenti*, not followed by any con-
" summation shown, *valid*, to the full extent of voiding a
" subsequent regular marriage, contracted with another
" person." (2 Hag. E. R. 67.) And that " the same
" doctrine was *recognised* by the temporal Courts, as the
" existing rule of the matrimonial law of this country."
(Ibid. 68.) Sir Nicholas Tindal, on the other hand, holds, that " by the English *ecclesiastical* law, a contract of mar-
" riage, *per verba de præsenti*, was not alone sufficient;
" but that by the same law, to make the marriage com-
" plete, there must be the presence and intervention of the
" priest" (Opins. p. 6), and that " the *common law* has
" never held a marriage complete without such celebra-
" tion." (Ibid. p. 2.) In the sense, in which these positions of the learned Chief Justice will be understood by ordinary readers, they cannot but derogate from that weight and authority, which has hitherto been ascribed to the judgment of my noble master, friend and benefactor.

Such being my motives for addressing your Lordship, I proceed, without further preface, to state the point, which it is the chief object of this letter to maintain, namely, that by the law of England, prior to the year 1753, a contract of marriage *per verba de præsenti* alone, between two competent persons, constituted a marriage.

My Lord, the learned Chief Justice says, it did not constitute " a *complete* marriage." I am unwilling directly to controvert this assertion, because I confess, I do not clearly comprehend the force and effect, which it is intended to carry. The learned Chief Justice elsewhere uses the terms " a legal marriage" (Opins. p. 8), " an actual marriage" (Opins. p. 9), " a valid marriage" (Opins. p. 10), intimating, at least, a doubt, that they were ever constituted by a consent *per verba de præsenti* alone. What I mean to assert is, that such a consent constituted what the

canonists call " matrimonium ratum," " ipsum matrimonium," " very matrimony," and which was in England actual, legal, and valid; in short, it was marriage *de jure*, that indissoluble bond, which unites a husband and wife "until death them do part;" and which, so long as it lasts, incapacitates each of them from forming a like union with any other person. Doubtless, my Lord, a marriage so constituted, though valid, was irregular; it was forbidden by the laws spiritual and temporal; it was discountenanced, it was detested, it was punished; but it could not be *annulled*. The church denounced against it grievous censures; the state refused to it important privileges; public opinion stigmatised it with contempt; private conscience tortured it with remorse; but still it was A MARRIAGE, a yoke which must be borne, a knot which could not be untied. Such, I say, was the law of England from the thirteenth century, the earliest period at which we have any clear and systematic view of that law, to the middle of the eighteenth. During all that time a contract *per verba de præsenti* alone was deemed a clandestine marriage, and as such was prohibited; but still the legal maxim applied to it, " *actus non redditur nullus, ex solâ prohibitione legis.*" Who was to pronounce it null? A sentence, to that effect, by an incompetent Court would have been itself a nullity; and in a competent Court no judge could have pronounced the marriage null, without a law for the annulment recognised in that Court. But no such law existed; nay, the law constantly recognized and acted upon, in the only Courts competent in England to entertain the question, did, as I shall presently show, most clearly and unequivocally declare all such marriages to be valid.

My Lord, this is matter of legal history, and is to be examined on the best historical evidence, that the case will afford: and I need not remind your Lordship, that the present age is much better furnished with such evidence,

than some preceding times were. Our legal antiquaries have better data to go by, and fewer prejudices to mislead them, than their predecessors had. No man of moderate information at present would give credit, like Coke, to the "*Modus tenendi Parliamentum;* or ascribe, as more enlightened writers have done, the invention of trial by jury to King Alfred.

On the other hand, it is perhaps difficult for us to divest ourselves of the habits and modes of thinking, which have prevailed in society, as long as our personal experience has extended. It is truly observed, that "for nearly a century the whole doctrine relating to contracts of marriage "has become nearly a dead letter in our Courts." (Opins. p. 1.) No wonder, therefore, that we feel a sort of repugnance to believe, that those contracts ever had a weight and importance, which they have long ceased to possess in the concerns of ordinary life.

I would make one more remark. Let it not be supposed, that when I am endeavouring to prove that a principle was heretofore maintained in the ecclesiastical courts, I mean to uphold or to approve of it myself. When I say that marriage was deemed for centuries, in England, a sacrament, I certainly do not mean to assert that it was properly so considered. And when I state, that the ecclesiastical jurisdiction in matrimonial causes was originally founded on that notion, I as little mean to contend, that the jurisdiction should have ceased, when the notion was exploded.

I have to prove, then, my Lord, always with deference to better judgments, that by the matrimonial law of this country, prior and down to the year 1753, a contract of marriage *per verba de præsenti* alone, between competent persons, constituted a marriage *de jure*. And I say first, that such was the law and practice of the English *Ecclesiastical* Courts, at least from the thirteenth century; secondly,

that from the same period, the law and practice of those courts, on that point, was *recognized* by the English Common and Statute Law; and thirdly, that much of the error, which has prevailed on this subject, has arisen from confounding marriage *de jure* with marriage *de facto*.

I. The Law and Practice of the Ecclesiastical Courts may be considered at four periods of their history: first, from the establishment of those courts to the formation of a systematic body of laws for their guidance; secondly, from that time to the Reformation; thirdly, from the Reformation to the Marriage Act of George II.; and fourthly, from that epoch to the present day.

1. Of the first period little is known, beyond the fact of the foundation of the courts in question, and what may be collected or inferred from the general histories of the time. The Ecclesiastical Courts were established by a mandate of William the Conqueror, separating them from the Hundred and County Courts, and giving them exclusive jurisdiction in spiritual causes. This mandate is still extant. It is without a date, but it is assigned, by Sir Henry Spelman, apparently on good grounds, to the year 1085 (Spelman, ii. 14). It does not appear to have been carried at once into full effect; for we find bishops still occasionally attending the County Courts in the reign of Henry I.; but it gradually assimilated the jurisdiction of the Church, in England, to that which it exercised throughout the rest of civilized Europe. Of the law administered in the English Ecclesiastical Courts at this period, there remain no very distinct records; but thus much is certain, that it was not regarded as the law of "the Church of England," separate from and independent of the See of Rome; for the Roman Church assumed to be catholic, one, and indivisible; and to her visible head all the provincial, metropolitan, and diocesan authorities in western Europe were subordinate. Still less could it then be "known by the distinguishing

title of the King's Ecclesiastical Law" (Opins. p. 10); for not only were the Courts Christian contradistinguished from the king's courts, in substance and procedure as well as in name; not only had the king no part in the nomination of their judges and officers; nor did any appeal from them lie to his courts; but the law of Holy Church was universally recognized as paramount, in all matters spiritual. The Pope was the one great spiritual pastor of all believers, their lawgiver in the faith, and ultimate judge in an appeal from all spiritual judicatories. To his decrees, within a sphere which owned no earthly bounds, kings and emperors were deemed to be as completely subject, as the meanest of their vassals or slaves. Nay, they boasted of a submission, which distinguished them from infidels, and opened to them, by the mediation of St. Peter, the gates of paradise.

William the Conqueror, at the height of his glory, says to Pope Gregory VII., "We particularly desire to love you sincerely, and to listen to you *obediently*" (Turner, M. A., i. 131); Henry II., in the midst of his furious contest with Thomas à Becket, is represented to Pope Alexander III. by the then Bishop of London, as saying, "He will love you as a father, and *obey your orders*" (Ibid. 259); and every school-boy knows the painful and humiliating penance, by which, on the death of Becket, this monarch sought to avert the papal vengeance.

That there has been, at all times, a large debatable ground, on which the temporal and spiritual authorities have come into collision, is notorious; nor is it less so, that in Catholic England, as well as in other Catholic countries, the sovereigns often disallowed those Canons of the Church, which invaded the domain of the secular power. These struggles were carried on, during the first period of English ecclesiastical jurisdiction, with various success. If the three first Norman kings offered a powerful resistance to

the Papal encroachments, their four immediate successors were reduced to submissions, which ended in the shameful homage of John to the chair of St. Peter, for his very crown. But during the whole of this period, no one dreamt of questioning the Pope's *spiritual* supremacy, or his legislative or judicial power over the consciences of Christians. Not only did Papal Legates appear in England, exercising a spiritual jurisdiction derived solely from the Pope; but our kings themselves stood as parties in appeal before the Papal Tribunal at Rome. In the year 1187, judgment was given, in the Roman Court, against Henry II., King of England, in a suit between him and the Monks of Canterbury, in which two eminent Canonists were employed as Counsel, Peter of Blois for the king, and Pilius for the monks. To this suit allusion is made, in the Gloss to the Decretum (2, 23, 2, c. 2.)

Two main causes gave the Church in England this overgrown predominance; its vast wealth, and its supposed sanctity. Archbishops and Bishops, enriched by inordinate grants, and invested with feudal dignities, sate in Parliament, appeared in public, and even marched to battle, as equals of the greatest Barons in influence, in splendor, and in the number of their military retainers. And it is well observed by Mr. Sharon Turner, that "the power which the "Priest claimed, and was believed to possess, of *creating* "*the Deity;* his privilege of hearing confession, and giving "or withholding absolution, and of inflicting, mitigating, "or aggravating penance; his supposed control over pur-"gatory and hell; his awful excommunications and tre-"mendous interdicts, could not but generate, in the laity, "a subjection and servility of mind." (M. A. 5, 163.) While such was the power of the Church, its laws (at least within their proper sphere) must have held an authority over the conscience, altogether independent of any earthly sanction. We may regret the operation of such causes; but we must

remember, with the last-mentioned writer, "that it was the "mental condition, it was the social wants of Europe, "which gave such predominance to the Holy See" (Ib. 5, 31), and with M. GUIZOT, "that the spiritual power find- "ing itself in possession of all the intelligence of the age, "at the head of all intellectual activity, was naturally led "to arrogate to itself the general government of the world." (Civ. Mod. Eur. lect. 5.)

Doubtless, a different theory might be framed from my Lord COKE's report of Caudrey's case (5 Rep. 1), or Sir JOHN DAVIES's, of the case of Commendams, (p. 69.) But the age, which can boast a SAVIGNY and a HALLAM will make small account of the antiquarian lore of a Coke or a Davies. Of Coke's reasoning, I know not how much is to be set down to his own account, and how much to that of the Judges, his contemporaries; but his premises are as vague, as his conclusions are illogical. William I., amid the violences of a conquest marked with unbounded spoliation, may have forcibly appropriated some churches. Henry I. may have used, in a charter, the vague phrase of "tam ecclesiasticæ, quàm regiæ prospectu potestatis." In the reign of Henry III. the temporal Courts may have prohibited the Ecclesiastics from intermeddling with certain matters, which were really not spiritual; or may have required them to certify the truth, on questions of a spiritual nature; but all this, and much more to the same effect, is very far indeed from proving that any one of these monarchs assumed to be the Head of the Church, or did not recognise the Pope as his spiritual pastor and master, and own himself and all his subjects to be bound, in spiritual concerns, by the law of "Holy Church."

Among other supposed proofs of the King's spiritual supremacy, Coke cites the famous answer of the Barons at Merton (A. D. 1235), "Nolumus leges Angliæ mutari." But this phrase was used with a totally different import.

The Popes had sanctioned the principle of the legitimation of a child by the subsequent marriage of its parents, a principle, which, as being consonant to natural justice, is maintained, to this day, by the law of Scotland, of France, &c.; and by which I myself have been necessarily governed, in administering the law of Malta. The Common Law of England, however, held a contrary doctrine. Now, the Bishops did not pretend, that this was a matter merely spiritual. They desired, that when they themselves were called upon to certify to the Temporal Courts, in a question of bastardy, they might be allowed to certify a person to be legitimate, whose parents had married after his birth. In other words, they moved (as any Member of Parliament may do at the present day), that legitimation by subsequent marriage should be the law of the land: and this motion the lay Barons rejected, without the slightest idea of calling in question the spiritual supremacy of the Church. The difficulty was at last obviated (as we learn from Bracton) by altering the form of the issue sent to the Bishops, from "an legitimus" into "an pater desponsavit matrem;" which left the spiritual question of validity of marriage to the spiritual tribunal, and reserved to the temporal Court the temporal question of fact, as to ante-nuptial or post-nuptial birth.

The broad assertion in Sir John Davies's reports (p. 69), "that the interpretation, dispensation, or execution of the "Canons received in England belonged solely to the King "and his magistrates," if applied to this period is no less contrary to the plainest historical evidence, than his other statement is, that "the Ordinances of Kings Edgar, Athel-"stane, Alfred, and Edward the Confessor are parts of our "Ecclesiastical Laws at this day." The Canons, in matters spiritual, could only be interpreted by the Courts Christian; and we may defy all research, to show that any ordinance of a Saxon monarch was received as law in those Courts,

at least from the thirteenth century. We have no knowledge, indeed, that the ecclesiastical tribunals ever recognised any law or practice of earlier date than their own establishment in 1085; but supposing them to have done so at first, they must have abandoned that part of their practice, on the publication of the Decretals, as will hereafter be shown. I should, therefore, be disposed to take no notice of any Ordinance prior to 1085; but as Sir Nicholas Tindal has adverted to two such, I will briefly consider how far they bear upon the point at issue.

The first is an Ordinance of the Saxon King *Eadmund*, (Opins. p. 12), passed (among several others) at an assembly of Clergy *and Laity*, about the year 940, and comprising nine articles, under the title "Quomodo desponsanda virgo, "et quibus ritibus procedendum sit." Now, the whole of this law is simply admonitory, without any penalty whatever being denounced against the violation of any of its provisions, or any nullity annexed. The first seven articles state, that the Bridegroom must pledge his faith to a variety of particulars, such as the making provision for the joint maintenance of himself and his wife; for the portion of his goods which she should have after his death; for her safety, if removed to the lands of another Thane, &c.: and it is added that his friends must guarantee his engagements, and that her friends must guarantee her good character and conduct. Among these provisions is that of the eighth article, in these terms—"Nuptiali huic dationi Missalis aderit Sacer-"dos, is, de jure, eorum conjunctionem Dei benedictione, "in omnem felicitatis plenitudinem, promovebit." (Lambard, p. 61.)—There is not the least intimation that the Mass Priest's blessing is more essential to the validity of the marriage, than any one of the provisions contained in the seven preceding articles. Much less is it to be inferred that the want of a blessing, or any defect in the title of the

Priest pronouncing it, would have rendered the marriage a nullity.

The other Ordinance is one passed in a Council held at Winchester by Archbishop Lanfranc, in the year 1076, which the Chief Justice considers as "containing a direct "and express authority, *with a nullifying clause*, that a "marriage without the benediction of the Priest should *not* "be a legitimate marriage, *and* that other marriages should "be deemed fornication." (Opins. p. 12.) This Ordinance is one of those first brought to light, after having lain for centuries in oblivion, by the persevering industry of that able antiquary Sir Henry Spelman. The clause, to which the Chief Justice alludes, is this, "si aliter fecerit, non ut "legitimum conjugium, sed ut fornicatorium judicabitur." (Spelman, 2, 14.) If this was intended to have the effect of rendering a marriage contracted without benediction altogether null and void, I cannot but think the clause very inaccurately drawn. It does not say judicabitur nullum, or invalidum, or non ratum, but non legitimum, in reference, possibly, to a distinction of the Canonists between "legitimum" and "ratum:" and then, in further explanation, it adds, "sed ut *fornicatorium* judicabitur."—Fornicatorium, what? Surely, in grammatical construction, fornicatorium *conjugium*. Now, either conjugium was meant to be synonymous with matrimonium, or it was not. If it was, then the construction is, a marriage not blessed by a Priest shall not be deemed a marriage agreeable to the laws, but still it shall be deemed a marriage, though of the nature of fornication. If conjugium was not meant to be synonymous with matrimonium, then the clause in question is altogether irrelevant to the validity or invalidity of any marriage.

2. But whatsoever may have been the intention, or the effect of either of these Ordinances, they were both superseded, in the law and practice of the Ecclesiastical Courts,

by an authority, which neither King Eadmund nor Archbishop Lanfranc (certainly not the latter) would have presumed to resist. And this brings me to the second period in the history of our Ecclesiastical Courts. The Ecclesiastical Law had hitherto been a mere "rudis indigestaque "moles." Certain *Canones* or spiritual rules had, indeed, been collected at different epochs, by Ivo, Burchard, and others; and these *Canones* were so called from the beginning, in opposition to the *Leges*, or temporal laws; but the collections were imperfect, unauthentic, confused, and not seldom contradictory. Even civil jurisprudence, after the dark ages, did not begin to resume the form of a science, until the close of the eleventh century, when *Irnerius* (or Werner) founded the school of Roman Law, which soon rendered Bologna so celebrated a resort for law students. About the middle of the succeeding century, the Monk GRATIAN produced his laborious "Concordance of the Discording Canons," better known by the name of the *Decretum*, and intended by its author to form the basis of a "Corpus Juris Canonici." This work, though abounding with errors, which the age was too illiterate to rectify, was received by the Churchmen throughout Europe with immense applause, and soon formally taught in the Universities. And as the Professors of the Cæsarian or Civil Law were honoured with the title of *Legum Doctores*, so those of the Pontifical or Canon Law assumed that of *Decretorum Doctores*. Basianus, who died in 1197 (Savigny, 5, 210), and Placentinus, who died in the following year (*Ibid.* 4, 213), had both lectured alike on the Digest and on the Decretum; and Tancredus is mentioned in 1214, while living, as Decretorum Magister, and subsequently on his tombstone, as "Decretorum Doctor." (*Ibid.* 5, 106.)

Still, the Decretum was the production merely of a private individual. But it stimulated the Popes, who assumed to themselves the general direction of education, as well as

the right of ultimate appeal in all spiritual causes, to put forth some authentic collections of their decisions. In 1226 Pope Honorius III. sent a compilation of Decretal Epistles to Bologna (and probably to other universities), enjoining that they should be taught and used, as well in the *Courts* as Schools of Law. (Savigny, 5, 108.) And at length, in 1234, appeared the celebrated work in five books, called the *Decretals*, stamped with the formal authority of Pope Gregory IX., who, in the preamble to the whole, ordains that this compilation alone shall be used in the *Courts* and in the Schools. Upon this passage the Gloss adds, "But what if any should use or teach any prior "collection? Answer, they should be excommunicated." Justly therefore does Mr. Hallam observe, that "the study "of this Code (the Canon Law) became *obligatory* on "Ecclesiastical Judges." (Mid. Ag. 2, 287.) Nor could there be one Canon Law for one part of the Latin Church and another for another. "Let there not be a part so base" (says Pope Innocent III.) "as to be incongruous with its "whole; and therefore let the Church of Modena humbly "hold and observe what it perceives the See of St. Peter "and its own Metropolitan to follow and teach." (Dl. 4, 4, 5.)

The five books of Gregory's Decretals were followed by a sixth, published in 1298 by Boniface, and that by other decretal Epistles, under the name of Extravagantes, by subsequent Popes. To these are added, in some editions of the Corpus Juris Canonici, a *seventh* book of Decretals by Matthæus, and four books of *Institutes* by Lancellottus, works which, though they have never had (any more than the Decretum) the full stamp of papal sanction, have always been received, as of great authority, in the Canon Law.

In all parts of the Roman Church, there have often been local councils or Synods, which have issued ordinances, under the presidence either of Papal Legates, or of Metro-

politan, or Diocesan Prelates. The Bishops, too, have sometimes issued Pastoral Letters, and other regulations for their respective dioceses; but all these measures have been taken, in entire subordination to the See of Rome; sometimes modifying its decrees to suit particular local circumstances; but never, in any instance, contravening a rule laid down by the Supreme Pontiff, to whom, in fact, all Roman Prelates swear obedience, before they can enter on their sacred functions.

The only collections of such acts, which, so far as can now be known, were ever received as works of authority in the English Ecclesiastical Courts, are the Legantine Constitutions of *Otho* and *Othobon*, with the Glosses of *Joannes de Atho*, and the Provincial Constitutions of successive Archbishops of Canterbury, with the Glosses of *Lyndewood:* all which Constitutions and Glosses are usually printed together, and commonly referred to by the name of Lyndewood. The Legate Otho was sent to England by Pope Gregory IX. in Henry III.'s reign, only two years after the publication of the Decretals; and his object clearly was to correct any thing, in the ecclesiastical arrangements of this country, which might be contrary to the rules just laid down for the universal Church, by the pontiff, whose commission he bore. *Othobon* arrived on his legantine mission in the latter part of the same monarch's reign, and held a Council at London in 1268. Joannes de Atho wrote his Glosses about 1290; and Lyndewood made his Compilation and Glosses in 1423. The latter had been an Ecclesiastical Judge, as Official of Archbishop Chichele; and the Ordinances collected by him had emanated from different Archbishops, between the years 1222 and 1417. None of these authorities take the slightest notice of the laws of the Saxon Kings, or of the Ordinance of Lanfranc above mentioned.

Such were the works necessarily referred to in the English

Ecclesiastical Courts, as of binding authority. It cannot be supposed that the doctrines of the Courts were in opposition to those of the Schools of Canon Law. One Code, as has been seen, was enacted alike for "the Courts and the Schools," by the legislative authority of the Pope. The judges and advocates in the Courts, no less than the lecturers in the Schools, were ecclesiastics, and doctors of the Decretal or Canon Law. In short, spiritual law and divinity were moulded into one uniform system: and if we examine the legal principles of the one, we shall find them only necessary inferences to be drawn from the theological doctrines of the other.

The first and great leading theological doctrine was, that Marriage was a *Sacrament*. This had been universally received in the Latin Church, from the time (at least) of Peter Lombard, the celebrated "Master of Sentences," who is supposed to have been the first individual honoured (about 1150) with the title of "Doctor of Divinity." From this doctrine flowed two obvious inferences. First, it was highly expedient that matrimony, being a sacrament, should if possible be contracted with the consent of parents or guardians, with devout preparations of prayer and the Eucharist, with open celebration in the face of the congregation, assembled in a sacred edifice; with the use of certain ritual ceremonies, and particularly with the presence, intervention, and benediction of an ecclesiastic. But secondly, if any or all of these desirable circumstances were wanting, still, so long as the *essence of the Sacrament* remained, the bond between the parties was *matrimonium ratum*, "true, pure, and perfect marriage," indissoluble by any human authority, according to the precept, "What God hath joined together let not man put asunder." (Matth. 19, 6.)

What then was the *essence* of the *Sacrament*, according to the received doctrines of the Church? The two great

theological luminaries of the thirteenth century were THOMAS of Aquino (better known as *St. Thomas Aquinas*) and JOHN of Dunse (commonly called SCOTUS), who, from that time to the present, have divided the Roman Divines, on certain points, into Thomists and Scotists; but who, in their doctrines on the sacrament of marriage, perfectly agree. St. THOMAS says, "The sufficient cause of matrimony is a "consent expressed *per verba de præsenti;* therefore, "whether it be done in private or in public, marriage is "the result." (Secund. Sec. Suppl. Qu. 4, Art. 5.) And again: "A consent expressed *per verba de præsenti*, be- "tween lawful persons, is sufficient to the contracting of "matrimony; for these two things are of the *essence* of the "sacrament, but all the other things are of the *solemnity* "of the sacrament; and they are used, in order that the "marriage may be done in a more becoming manner; "therefore, if they be omitted, there is still a *true marriage;* "but yet those persons commit sin who so contract, unless "they have a legitimate ground of excuse." (Ib.) SCOTUS says: "To the conferring of this sacrament, there is not "required the ministry of a priest; for the sacerdotal bene- "diction, which the priest is wont to make or utter upon "married people, or other prayers uttered by him, are "neither the form of the sacrament nor its essence, but "something sacramental, pertaining to the adorning of the "sacrament."

That these doctrines were received in England appears from the work of *John De Burgo*, noticed by Sir Nicholas Tindal; and that they continued to be held by the Roman Church, down to the time of the Council of Trent, is fully shown by *Sanchez*, whose work will be mentioned hereafter.

*John De Burgo* was Chancellor of the University of Cambridge, and must consequently have known the Ecclesiastical Law, both as taught in the schools and as practised in the Courts. He, about the year 1385, compiled a work

entitled "*Pupilla Oculi*," for the particular use of English priests. In treating of the sacrament of marriage, he says, "Marriage is the lawful conjunction of man and woman, "to wit, of their *minds*" (fo. 24 b.)—"the matter of this "sacrament is the contracting parties themselves—the form "is the *words expressing mutual consent*—no other minister "of this sacrament is to be required distinct from the "parties contracting; for they themselves, for the most "part, administer this sacrament to themselves, either the "one to the other, or each to him or herself." And elsewhere he cites and adopts the passage above quoted from Scotus.

Such being the doctrine of the divines (one of them a canonized saint of the Church), I have now to show that the laws of the same period, to be found in the Decretum, the Decretals, Lancellottus, and Lyndewood (the only collections known to be then recognised, as binding, by the English Ecclesiastical Courts), were nothing but practical commentaries on the theories of the theologians.

In the *Decretum*, the chief authorities cited, on the validity of marriage, are St. Augustine, St. Ambrose, and Pope Nicholas. *St. Augustine* thus distinguishes a promise *de futuro* from a consent *de præsenti*: "If any man engages "his faith to a woman, in the way of *promise*, he ought "not to marry another; but if he does marry another, he "should do penance for his breach of faith, nevertheless "he must remain with her whom he has married. But if "he engage his faith, in the way of *consent*, and afterward "marry another, *he must dismiss the latter and adhere to* "*the former*." (Decretum, 2, 27, 2, c. 51.) *St. Ambrose* says, "Not the deflowering of virginity makes marriage, "but the conjugal paction;" which word "paction," the Gloss explains to mean "a consent *de præsenti*." (Decretum, 2, 27, 2, c. 5.) *Pope Nicholas* says, "Let the *con-* "*sent alone* of those whose conjunction is in question be,

" according to the laws, sufficient." (Decretum, 2, 27, 2, c. 2.)

In the *Decretals*, Pope Alexander III., Pope Innocent III., and Pope Gregory IX. are still more explicit. *Alexander* says (about the year 1170), " If between a man and " woman a legitimate consent intervene *de præsenti*, so that " one takes the other, with their mutual consent, expressed " in the usual words, one saying, '*I take thee as my wife*,' " and the other saying, '*I take thee as my husband*,' " whether an oath be interposed or not, it is not lawful " for the woman to marry another; and if she marry, even " though a carnal intercourse should follow, she ought to " be separated from the latter, and compelled, by ecclesi- " astical constraint, to return to the first." (Decretal. 4, 4, 3.) And elsewhere he says: " If any man make oath to a woman " in such words as these, 'I *will* take thee to wife, if thou " give me so much,' he shall not be deemed guilty of per- " jury in case he refuse to make her his wife (she not " paying him the sum mentioned), unless a consent *de* " *præsenti* or a carnal commixture shall have taken place " between them." (Decretal. 4, 5, 3.) *Innocent* (about 1215) thus speaks: " You ask whether matrimony can be " contracted by words alone, and by what words. To " your question, then, we answer thus: that in truth ma- " trimony is contracted by the lawful *consent* of a man and " a woman; but in regard to the Church, words express- " ing a consent *de præsenti* are necessary." (Decretal. 4, 1, 25.) And again: " In marriages henceforward to be " contracted, we will that thou observe this, that after a " legitimate consent *de præsenti* has intervened between " legitimate persons, (which in such persons is sufficient, " according to the Canonical Laws, and which if it be " alone wanting, all other celebrations, even accompanied " with sexual intercourse, are in vain,) then, if the persons " legitimately united should afterwards contract, in fact,

" with others, that which was first done lawfully cannot " be invalidated." (Decretal. 4, 4, 5.) *Gregory* (about 1230) adopts the terms of Alexander's first quoted decree, only extending the prohibition of the woman's second marriage to the man's also. (Decretal. 4, 1, 31.)

If we turn from the express decrees of Popes to the Institutes of Lancellottus (1563), we shall find the legal principles thus summed up: " Matrimony is to be reckoned " among the Sacraments." (L. 2, De Sacr. Matr.) " Ma- " trimony is begun by betrothment; it is *ratified by con-* " *sent;* it is consummated by sexual intercourse." (Ibid.) " Men and women of fit age of puberty contract matri- " mony when they reciprocally *consent* thereto." (L. 2, De Nuptiis.) " But though by the legitimate consent alone " of the man and woman a marriage is contracted, yet, as " regards the Church, some *words* expressing a *present* " *consent* are necessary." (Ibid.) " Words fit for this " purpose are these, ' *I take thee for my husband,*' ' *I take* " *thee for my wife,*' or similar words expressing a consent *de* " *præsenti.*" (Ibid.)

To these textual authorities may be added many glosses, titles of laws, &c. proving the universal understanding of the Canonists, as well compilers as glossators, to be, that a present consent alone constituted a valid marriage. For instance, " Matrimonium solo consensu contrahitur." (Decretal. 4, 1, 1, Title.) " Matrimonium dicitur contrahi per " mutuum consensum." (Decretal. 6, 1, 19, c. 9, Gloss.) " Solo consensu legitimo contrahitur matrimonium, sed " verba requiruntur quoad probationem, (Decretal. 4, 1, 25, Title) &c. &c.

I have said that these marriages, though valid, were irregular and punishable. It would appear, from a very early period, to have been the practice of Christians to add to the matrimonial consent of the parties a public religious solemnity. If we may credit Gratian, this was

enjoined by Pope *Evaristus*, about the end of the first century (Dm. 2, 30, 5, 1); and by Pope *Hormisda*, early in the sixth century. (Ib. 2, 30, 5, 2.) At these periods the Civil Law recognised marriages contracted by consent alone as valid; and the Christian Bishops of Rome would scarcely have ventured so far to set the imperial authority at defiance as to declare such marriages to be nullities; nor indeed is it pretended that they ever did so. Canons enjoining a public religious solemnization were certainly frequent in later ages; but it is to be observed, 1st, That the ceremonies ordained for this purpose by different Popes and Councils were very different; 2dly, That none of their ordinances declared a marriage contracted without the prescribed solemnities to be null and void; 3dly, That the very individuals who most strictly prohibited clandestine marriages, did elsewhere declare them to be so firm and binding as to render of no effect subsequent marriages, however public, solemn, blest, and consummated (Compare Decretals 4, 3, 3, and 4, 4, 3, with 4, 1, 25, and 4, 4, 5); and, 4thly, That it was distinctly held, that "Solemnities "are not of the substance of marriage; that they ought "indeed to be observed; but that though they be not "observed, the marriage holds good; because a consent "alone makes a marriage." (Decretal. 4, 1, 1, Gloss.)

Such were the doctrines of the Canon Law at the period under consideration. But it is objected that the general Canon Law of Europe was not the law by which the spiritual Courts of this kingdom were governed. (Opins. p. 11). My Lord, I have already admitted that the Canon Law was not allowed without exception in England; and I have shown why it was not. The question, therefore, is not whether the *whole* Canon Law was administered by the English Ecclesiastical Courts; but whether *that part* of it, which declares a consent *de præsenti* alone to be a marriage, was or was not recognized by those Courts as

binding. Now, on what principle or by what authority could they reject this part of a code, which was expressly promulgated for their guidance? Could they say, that they were prohibited by the king, or parliament, or lay judges, from adopting this part of the Canon Law? No such prohibition ever issued. Could they set up the ordinances of King Eadmund, or Archbishop Lanfranc, in a matter universally allowed to be spiritual, against those of the Holy See? They would have been deemed schismatics. Could they deny marriage to be a sacrament, or judge otherwise of that sacrament than the Church judged? They would have been deemed heretics, and (at least after Henry IV.'s time) they might have been subjected to the writ *de hæretico comburendo.*

My Lord, I do not deny, "that the Canon Law had "been modified in England by the ecclesiastical constitu- "tions of our archbishops and bishops." (Opins. p. 10). For instance, Pope Innocent III. in the Council of Lateran (A.D. 1215) had enacted that previously to the solemnization of any marriage it should be proclaimed by a priest "prefixing a *competent term.*" (Decretal. 4, 3, 3). Archbishop Reynolds (A.D. 1322) cites this Decretal, and enjoins that the proclamations shall be "on *three Sundays or holidays*, with intervals between them," (LYNDEWOOD, 4, 1), on which the Gloss observes, that the Archbishop's rule is to be taken as limiting the Decretal. (Ibid.) Modifications of this sort, which went the more effectually to enforce one Papal decree, without infringing another, were certainly within the power of the Archbishops; but did any prelate ever venture to contravene the above quoted decrees of Alexander III., Innocent III., or Gregory IX., declaring marriage to be constituted by consent alone? Assuredly not. On the contrary, Archbishop Arundel strictly prohibits all persons from teaching, preaching, or observing any thing concerning *matrimony*, different from what the

Church has determined in the decrees and *Decretals.* (Lyndewood, 5, 5, A. D. 1408). And among the heresies of the Lollards was reckoned their teaching, that Christians were not bound in spiritual matters by the Pope's *Decretals.*

It has been urged, that though many Councils of the English clergy were held, during the period now under consideration, in which decrees were passed to prevent or punish clandestine marriages, yet none repealed the nullifying clause in Lanfranc's ordinance. (Opins. p. 12). I have already shown, that the clause alluded to had not a nullifying effect; and that if it had such, it would have been virtually repealed by subsequent papal decrees. But the ordinances against clandestine marriages afford another inference. They none of them declare such marriages to be null. Was this because they had been so declared by Lanfranc? Then, the prohibitions themselves would have been in great part unnecessary: and then Lanfranc's ordinance, on which alone would have rested a principle so important, so contrary to the Canon Law received in all other parts of Europe, and so directly opposed to the decrees of successive Popes, must necessarily have been referred to by the legates Otho or Othobon, or by the Glossators, Atho or Lyndewood, or at least have found its way into some part of the Provinciale, with other archiepiscopal ordinances. But no such thing is to be met with. Matrimony is declared to be a sacrament by Archbishop Stephen (A. D. 1222), and by the legate Otho (A. D. 1236), but it is nowhere said, that the intervention of a priest is essential to the sacrament; nor is it anywhere said, that a contract *de præsenti,* without such intervention, is not matrimony. On the contrary, Lyndewood expressly distinguishes "Espousals *de futuro,*" from "*Matrimony* contracted *de præsenti.*" (Lynd. 4, 1.)

It has been suggested, that clandestine marriages, as

well as others, were celebrated by a priest, (Opins. p. 12); but this was not always the case. In the Canon Law, "a "marriage is called clandestine, either, 1st, when there are "no witnesses to it; or 2ndly, when it is performed with- "out solemnity; or 3dly, when it is not preceded by the "publication of banns." (Decretal. 4, 3, 3. Gloss). Consequently, a marriage by consent *de præsenti* alone was no less a clandestine marriage, than a marriage solemnized by a priest without banns. The object of Archbishop Stratford's Ordinance (A. D. 1342) against the latter kind of marriages, was to prevent unions of persons legally incapacitated by consanguinity, or other like impediments, from marrying together. Ignorant persons so situated might perhaps persuade themselves, that their connexion would be in some degree sanctified by the intervention of a priest, and this Ordinance was intended to warn them against such an error; but in reality the presence or absence of the priest could not affect the legal incapacity of the parties.

I have thus, my Lord, reviewed the law, by which the decisions of the English Ecclesiastical Courts were governed during the second period of their history. Of the decisions themselves few traces now remain. Nor is this to be wondered at; for no Ecclesiastical Reports were ever published, until my learned friend Dr. Phillimore, about five and twenty years ago, laudably set the example, since followed by several of his colleagues. And indeed, as Lord Stowell has observed, "very few decided cases "are to be found in any administration of law in any "country, upon acknowledged and settled rules."—"It "would be difficult to find a litigated case in the Canon "Law establishing the doctrine, that a contract *per verba* "*de præsenti* is a present marriage, though none is more "deeply radicated in that law." (2 Hag. E.R. 93.) It happens, however, that we gain from the Common Law writers

some incidental notices of early Ecclesiastical proceedings, in which this very doctrine is recognized.

The first case noticed by Sir Nicolas Tindal (Opins. p. 3) appears to have occurred about the year 1282. It is to be found in Coke Littleton, 33 a, n. 10, and so far as concerns the Ecclesiastical jurisdiction, the circumstances are these, "A. contracts *per verba de præsenti* with B., and has issue "by her; and afterwards marries C. *in facie ecclesiæ:* B. "*recovers A. for her husband, by sentence of the Ordinary,* "and for not performing the sentence he is excommuni- "cated; and then marries B. *in facie ecclesiæ.*" Some proceedings subsequently take place in the Common Law Courts; but as they do not affect the question of ecclesiastical jurisdiction, I shall reserve their consideration to a future stage of my argument.

The case, however, so far as I have stated it, is plainly governed throughout by that part of the Papal Canon Law, which was common to England, with the rest of Europe. Let us review its passages separately:

1. "*A. contracts with B., per verba de præsenti.*"— Here is no priest, no witnesses, no banns, no Church, no congregation, no benediction! Is it then treated as a mere *civil* contract? Not at all. It is a sacrament, and therefore spiritual, and therefore belongs to the jurisdiction of the Ordinary; for (as Sanchez justly observes of a consent *de præsenti*), "if it had been a civil contract, the secular "judge would have taken cognizance of it." (Sacr. Matri. 2, 6, 2.) But in the case before us, the Ecclesiastical jurisdiction is undisputed; nor does any prohibition issue, to stop any part of the proceedings.

2. "*A. has issue by B.*" This, as we have seen, adds nothing, in the contemplation of the Canon Law, to the effect of a consent *de præsenti:* and if a sacerdotal benediction had been necessary to constitute a marriage, the

fact of issue could not have supplied the want of such a requisite.

3. "*A. afterwards marries C. in facie ecclesiæ.*" Here then are two marriages brought into collision; which of them is to give way; the one first contracted, with an utter disregard of all the solemnities enjoined by law; or the second, which is solemn, public, regular, blest? If the former had been a mere contract, affording to B. only a ground of action for a solemnization, *rebus integris*, it must have failed; because the *res* were no longer *integræ:* the personal *status* of C. had been altered, and by any new change her interests must be most seriously affected.

4. Nevertheless, "*B. recovers A. for her husband, by sentence of the Ordinary.*" Then we have the judgment of the only Court competent to decide the point, that a *contract per verba de præsenti* was *matrimonium ratum;* that A. and B., *from the time of so contracting,* had become one flesh; that they had been joined by God, and could not be put asunder by man; and that on the contrary, A. and C., though formally united with every external appearance of solemnity, never had contracted matrimony at all; because, as one and the same Christian man could not be, at the same time, the husband of two wives, living, if A. had been validly married to C., he could not have been recovered, as a husband, by B. Hence, if Lord Hale, in a note on this case, written 350 years afterwards, (Opins. p. 3,) meant to say, that the contract was not deemed a marriage by the Ecclesiastical Court, he was plainly in error; but if he merely meant to say, that it was not deemed such a marriage, as would carry with it the Common Law right of Dower, he may perhaps have been right.

5. "*A., for not performing the sentence, is excommunicated.*" What sort of duty did the sentence impose on A.? Simply a duty of order. The state of the parties was this: A. and B. had violated the laws of the Church by contracting a clandestine marriage. B. was willing to repair

their common fault by a public solemnization, and she calls on the Court to compel A. to join her in the discharge of this duty. The Court holds indeed, that "solemnities are not of the substance of marriage;" (sup. p. 24,) but since they have been so often enjoined, as matter of order, by the Church; since they may be essential to a clear proof of the marriage; and since B., who is willing to obey, might be grievously injured by A.'s non-compliance, the Court enjoins him to conform to the regulations of the Church; and punishes his contumacious refusal by its last weighty scourge, excommunication.

6. "*A. marries B. in facie ecclesiæ.*" Here, again, we find no doubt of the legality of the ecclesiastical proceedings. Neither A. nor C. ventures to appeal to the Metropolitan; nor does A. seek from the lay tribunals a writ of assoil; but after a fruitless resistance, he submits to perform those solemnities, which will reconcile himself and his partner to the Church, will give him a right in her goods, and will restore her to her temporal rights as his wife, and to her proper station, as such, in the eyes of the world. In describing the solemnization, the Common Law Reporter says A. *marries* B., and though, perhaps, in strictness, a man once legally married cannot be said to marry a second time his own wife; yet as the celebration was, of course, in the same form as that of a regular marriage, it would naturally be described by the same term; for such we ordinarily see to be the case with all parties, who, for any reason, go through a double marriage ceremony, Scotch and English, Catholic and Protestant, or the like.

*Foxcroft's* case (Rolle's Abridgment, 359), which appears to have been in the same year as the preceding, is relied upon, to prove, that a consent *de præsenti* alone was not held at that time to be a complete marriage. (Opins. p. 4.) The circumstances are these: "R. being *infirm*, and *in his*

" *bed*, was married to A. by the Bishop of London pri-
" vately, in no church or chapel, nor with the celebration
" of any mass, the said A. being then pregnant by the
" said R.; and afterwards, within twelve weeks after the
" marriage, the said A. is delivered of a son, and adjudged a
" bastard, and so the land escheated to the lord by the
" death of R. without heir." It does not appear in what manner (if at all) this matter came before the Spiritual Court. But supposing (as suggested by Sir Nicholas Tindal) that an issue was sent to the Ordinary " an Pater " auus desponsavit matrem suam," the Ordinary must have examined the proof, not only whether a consent was given, but whether it was a legitimate consent, that is, a consent by a free and capable person. Now, we know not how those proofs may have turned out; we know not whether R. " infirm and in his bed," may not have been light-headed at the time; whether he may not have been too deaf to hear what the Bishop said; whether he may not have actually dissented from the Bishop's words, or have clogged them with a condition resolving them into a consent *de futuro*. In short, we know too little of the case, to draw from it any inference whatever, as to the administration of law in the Ecclesiastical Court.

*Del Heith's* case, 34 Edward I. A. D. 1305, (Opins. p. 4,) is cited as " precisely the same in its leading facts." If so, it can afford no more information than the preceding as to the Ecclesiastical Law; but I shall hereafter notice both these cases, in reference to the practice of the Common Law at that period.

In 1 Rolle's Abridgment, 360, two points are stated, from a comparison of which (Opins. p. 12) it seems to be inferred, that in the time of King Henry VI. neither the Ecclesiastical nor the Temporal Courts considered a contract *per verba de præsenti* to be " a marriage." The points are these:—1. " A man who hath a wife takes ano-

ther wife and hath issue by her; this issue is bastard by "both laws; for the second marriage is void." 2. "A "divorce *causâ præcontractûs* bastardizes the issue." So far as these points relate to the temporal disqualification of bastardy, I shall consider them in the second branch of my argument, under the year 1440. But so far as regards the proceeding in the Spiritual Court for a divorce *causâ præcontractûs*, I must notice them here. Now, the very application for such a divorce implied that the precontract was, in substance, a marriage; for the applicant must have gone through some form of marriage, and possibly the most solemn, and how could he pray it to be dissolved for any reason but one, which showed that it wanted the essence of a sacrament, a legitimate consent?

In order fully to understand this, we must remember, that marriage, by the law of the Church, when once validly contracted, could be dissolved only by death, natural or spiritual. The Ecclesiastical Courts could only grant a divorce (which here means a divorce *a vinculo matrimonii*) when the marriage was not *matrimonium ratum*, true and perfect matrimony, but only a marriage in outward show and appearance, one which wanted the essence of the sacrament, namely, a legitimate consent; either for defect of freedom or of age, or of mental or physical power, or because the parties were legally incapable of consent by reason of consanguinity, or affinity natural or spiritual, or by reason of having entered into religious profession, or of having already bound themselves, sacramentally and indissolubly, to another person. Now let us take the case above quoted from Coke Littleton:—"A. contracted with "B. *per verba de præsenti*, and afterwards married C. *in facie* "*Ecclesiæ*." B. there proceeded to recover her husband; but C. might have proceeded for a divorce, that is, to be released from the bond of marriage with A. What cause could she have alleged, for dissolving a marriage contracted

with all due solemnities in the face of the Church? None but this, that A. was incapacitated from giving a legitimate consent to that marriage, because he had precontracted with B., and by such precontract had bound himself indissolubly to B. for life, had perfected with her the Sacrament of Marriage, was her husband, and therefore could not be the husband also of another woman. If the precontract had not then been considered by the Ecclesiastical Law to be *matrimonium ratum*, this plea must have failed; and, indeed, there could have been no such thing as a divorce *causâ præcontractûs*. But we know that C.'s plea would have succeeded; because B.'s plea, which was founded on the very same principles, actually did succeed; and we also know, from the Year Books and like authorities, that divorces *causâ præcontractus* were, in those days, by no means rare in the Ecclesiastical Courts.

Thus, my Lord, have I shown that the principles of the Canon Law received at this period in England respecting the validity of Marriage, were in harmony with the doctrines of the theologians; and that the course and practice of the Ecclesiastical Courts were conformable to both. What is opposed to all this weight of evidence? The ordinance of Lanfranc, and the prohibitions of clandestine marriage. The ordinance of Lanfranc was prior in date to the existence of the Ecclesiastical Courts, and is not shown to have been ever recognized by any Court whatsoever: it was neither sanctioned by Legantine authority, nor admitted into the Provincial Collections; and, as far as appears, it had become wholly obsolete and forgotten, till brought into light by antiquarian research upwards of 500 years after its date. It does not distinctly assert a *consent de præsenti* not to be a *valid* marriage; and if intended to have that effect, it was virtually repealed by the Decretals, which, in questions of Matrimony, were declared by a subsequent Archbishop of Canterbury to be binding in England.

As to the Constitutions, which merely prohibit clandestine marriages, without any nullifying clause, I have only to repeat the maxim, "*Actus non redditur nullus, ex solâ "prohibitione legis.*" John de Burgo was well aware of their existence, for he says, "Inhibitum est contrahere "nuptias occultè;" but this did not alter his opinion, that whether contracted *occultè* or *publicè* they were still *nuptiæ*, if they had the essential part of the Sacrament of Marriage, namely, words of present consent employed by the parties themselves, *animo nubendi.*

Finally, that the general law of the Roman Catholic Church on these points remained unchanged until the Council of Trent, we have the precise declaration of the Council itself at its 24th Session (A. D. 1563). It formally asserts "that marriage is a perpetual and indissoluble "bond" (Doctrine), "that it is a Sacrament" (Ibid.), and "that it is of ecclesiastical cognizance" (Can. 12), and thus opens its decree of reformation—"Although it is not to be "doubted that clandestine marriages, made with the free "*consent* of the contracting parties, are *true and valid mar-* "*riages*, so long as the Church has not made them void— "and therefore those persons are justly to be condemned, "as this Holy Synod by its anathema condemns them, who "deny that they are true and valid—yet the Holy Church "of God, for most just causes, has always *detested* and "*prohibited* them." And then it proceeds to insist on the observance of banns and a public solemnization; but allows as valid (though irregular) a contract, in presence of the parish priest, without banns (being, as has before been shown, one species of clandestine marriage); and, for the first time in the history of the Roman Church, decrees that all other clandestine marriages "shall in *future* be null "and void." It is needless to add that the decrees of this Council were never received as part of the Canon Law of England.

3. I now come, my Lord, to the third period in the history of the English Ecclesiastical Courts, extending from the Reformation to the year 1753. And here I would observe, that the fundamental doctrine, on which the matrimonial law of this country so long rested, namely, that marriage was a sacrament, was not disputed by the early English reformers. Even *Wickliff*, daring as he was in some speculations, fully subscribed to the doctrine of the seven sacraments, including matrimony. This will appear from the *Trialogus*, written in 1384, very shortly before his death. He there states the sacrament of marriage to consist in a consent of the *minds* of the contracting parties, and thence infers, that the words used by the priest are, as to this effect, nugatory. King Henry VIII. maintained marriage to be a sacrament, both before and after his rupture with the Pope. The work which, in 1521, obtained for him from Pope Leo X. the title of "Defender of the Faith," was entitled "Concerning the Seven Sacraments." To this Luther, in 1522, replied, by maintaining (among other things) that marriage was no sacrament, but a mere civil contract. Henry, however, never adopted this doctrine; but after some vacillation, as to the number of sacraments, reverted to his first statement that they were seven.

The history of this monarch throws much light on the state of the ecclesiastical law of England at that period. For the first twenty years of his reign, he certainly did not pretend to any authority, legislative or judicial, in spiritual matters. On the contrary, in 1529 he submitted to appear, as a party, before the Papal Legates, for the decision of his marriage with Catharine of Arragon: and it was the proceedings in this suit, which eventually led him to throw off the spiritual supremacy of the Papal See. But he did not venture on this all at once. His first attack was on the temporalties of the Roman Court. In 1531,

(by stat. 23 Hen. VIII. c. 20.) the king and parliament declared the payment of annates or first-fruits of archbishopricks and bishopricks, theretofore made to Rome, "to be grounded on no just title;" but as they professed to proceed with "gentle courtesy and friendship," they left it to the king's discretion "to move *the Pope's Holiness* "and the court of Rome amicably, charitably, and reasonably to compound for the annates by some friendly, "loving, and tolerable composition;" styling the Pope, at the same time, their "*Holy Father;*" and declaring "that "the king and all his natural subjects, as well spiritual as "temporal, were as *obedient*, devout, catholic, and humble "children of God and Holy Church, as any people within "any realm christened."

In the following year (1532), they changed their tone. The statute 24 Hen. VIII. c. 12, was then passed, in which they no longer styled the Pope "His Holiness," or "their Holy Father," nor did they boast of their "obedience to Holy Church," but they declared, that it appeared from "divers, sundry, old authentic histories and chronicles, that "the realm of England was an empire governed by one "supreme head and king, to whom, next to God, as well "the spiritualty as the temporalty (i. e. as well churchmen as laymen) owed obedience." Consistently with this theory, the clergy, in convocation, about the same time gave the king the title of "Supreme Head of the Church of England," afterwards confirmed by Parliament; and hence as a natural consequence, the expression "the King's Ecclesiastical Laws" came into use. In regard to the law of Marriage, this statute of 1532 affords evidence very relevant to the points which I have hitherto considered. In the first place, it declares causes of matrimony to appertain to the *spiritual* jurisdiction; and secondly, it shows, that down to the time of its enactment, appeals had lain, in such causes, from the Ecclesiastical Courts in England to the

See of Rome. Now, the necessary inference from this fact is, that the general Canon Law *as to Marriage* (which assuredly governed the Roman judgments) must also have governed those of the English Courts Christian; for there is no principle plainer, in matter of jurisdiction, than that the settled law of the judge *ad quem* must be followed by the judge *a quo:* and as it has been fully shown, that by the general Canon Law a consent *de præsenti* was held to be a valid marriage, it follows, that such must have been the law of the English Ecclesiastical Courts down to 1532, as we have seen it was in 1282, by the case cited from Coke Littleton.

The Statute of 1532 having established that all spiritual causes should thenceforward be finally decided within the realm, it became necessary to determine whether the English Ecclesiastical Courts should follow the law, by which they had hitherto been guided, or should adopt another system: and this was settled (A.D. 1533) by statute 25 Hen. VIII. c. 19. By this act, a commission was to be appointed to review the Ecclesiastical Laws in general, and until such review should be made (which never happened) it was enacted, "that such *Canons*, Constitutions, Ordinances, " and Synodals Provincial, being already made, which be " not contrariant, or repugnant to the laws, statutes, and " customs of this realm, nor to the damage or hurt of the " King's Prerogative Royal, shall now still be used and ex- " ecuted, as they were afore the making of this act." This statute, indeed, was repealed by stat. 1 & 2 Phil. & Mar. c. 8, but revived by stat. 1 Eliz. c. 1, s. 6, which is still in force. "Therefore, (says Burn), the business, upon this " head, must be to inquire, first, what is the *Canon Law*, " upon any point; and then to find out how far the same " was received here before the said statute; and then to " compare the same with the Common Law, and with the " Statute Law, and with the Law concerning the King's

" Prerogative (which is also part of the Common Law), " and from thence will come out the genuine Law of the " Church." (Eccl. Law, Pref.) Following this course, we observe that, by the general canon law, a consent *de præsenti* was a valid marriage, and that this rule was received here for centuries before the statute in question: and as it is not pretended that the common or statute law, or the law concerning the king's prerogative, contravened the spiritual law, in this matter, till 1753, it follows that, down to that time, a consent *de præsenti* should have been held by the Spiritual Courts (as we shall presently see it was held) to be a valid marriage.

The next statute, to which attention has been directed, is that called the Act of the Six Articles, or the Bloody Act, (stat. 31 Hen. VIII. c. 14.) It is hardly safe to build important inferences on loose expressions in so monstrous a piece of legislation. However, the passage referred to is in sect. 5, enacting, that if any man or woman, who has vowed chastity, " do actually marry, or contract matrimony " with any person," he or she shall suffer death, &c. as felons. The inference suggested is, that " the contract is " one thing and actual matrimony another, *although* both " offences be visited with the same measure of punishment." (Opins. p. 9.) I should submit that the more natural inference would be, that actually marrying and contracting matrimony, if not used as synonymous expressions, were deemed in substance the same offence, and *therefore* visited with the same punishment. They were, in substance, the same offence, if the contract was a sacrament, a *matrimonium ratum*, binding the parties indissolubly to each other for life, and rendering their marriage with any other person a nullity, as much as a solemnized marriage could do: they were very different offences, if actual marrying alone gave the rights of marriage, while the contract only gave a right of action, *rebus integris*. In truth, the expressions " actu-

ally marrying," and "contracting matrimony," both imply the existence of a marriage. The individual is punished for contracting what? Matrimony. Then what he contracted is matrimony. If he had only contracted espousals *de futuro*, he could not have been punished under this statute. However, as I said before, little stress ought to be laid on expressions used in a law, which set common sense and common humanity so totally at defiance, and which so soon afterwards ceased to disgrace the statute book.

The stat. 32 Hen. VIII. c. 38, (A.D. 1540), (Opins. p. 9), requires more particular notice. It is entitled, "For Marriages to stand notwithstanding Precontracts." But as it was framed, like many other of this monarch's acts, with a special view to legalize his own sensuality and cruelty, it cannot be fully understood without adverting to his divorces from three of his wives, Catharine of Arragon, Anne Boleyn, and Anne of Cleves. Catharine of Arragon was the widow of his brother Arthur, and if her marriage with Arthur was consummated, then the marriage with Henry (as he argued after it had subsisted twenty years) was contrary to God's law; and if so, the Pope's dispensation for it, which had been obtained previously to the celebration, was void, and the marriage null. The obsequious Cranmer found the fact of consummation with Arthur proved; certain universities gave opinions against the Pope's power of dispensation in such a case; and a servile parliament sanctioned this divorce. (Stat. 25 Hen. VIII. c. 22.) The same Cranmer, in little more than two years afterwards, declared the marriage with Anne Boleyn null; and the parliament confirmed that annulment (stat. 28 Hen. VIII. c. 7), for "certain just, true, and lawful impediments," not specified in the act, but appearing from history to have been a precontract with Lord Percy, which the unhappy Queen was entrapped to admit to have been consummated.

(Burnet, Reform. b. 3.) Lastly, Anne of Cleves was divorced in 1540, on the like ground of a precontract made in her infancy with the Duke of Lorraine, and as there was no pretence of consummation with the Duke, Henry supplied an equivalent plea, by asserting that his own marriage had not been consummated. The statute in question was ingeniously framed with a view to all these cases. It provided that a marriage between *lawful* persons, solemnized in the face of the Church, and *consummated*, should not be dissolved by reason of any precontract not *consummated*. 1. The divorce of Catharine of Arragon, then, was good, because she was not a lawful person; and she was not a lawful person because (as asserted in stat. 25 Hen. VIII. c. 22) her marriage with Arthur had been consummated. 2. The divorce of Anne Boleyn was good, because her precontract with Lord Percy was consummated. And 3. The divorce of Anne of Cleves was good, by the previous Ecclesiastical Law, *causâ præcontractûs;* and her subsequent marriage with Henry, not having been consummated, formed intentionally a *casus omissus* in the new statute.

It has been intimated, that this statute gives no support to the doctrine, that by the law of *England* the contract *per verba de præsenti* was an actual marriage; because it speaks of the law to be corrected, as "an unjust law of the *Bishop of Rome.*" But it at the same time speaks of that law as having occasioned "many inconveniences," and caused "divers and many persons" to be "divorced and separate;" all which must be intended to have taken place in England. Now, as the Law of England for nearly 500 years had left questions of the validity of marriages to the Ecclesiastical Courts; the language of the statute affords additional evidence, if any were wanting, that the decisions of those Courts had been governed in such cases by the Papal Decrees. Moreover, your Lordship will observe,

that the statute does not affirm *all* divorces *causâ præcontractûs* to be unjust, but only those where the precontract had not been consummated, and the solemnized marriage had been followed by consummation; and it leaves the Ecclesiastical Courts to deal, as they always had done, with cases differently circumstanced. Consistently with this statute, therefore, they might, and doubtless would, have held, that a precontract, *per verba de præsenti*, alone, was more binding than a solemnized marriage not consummated; and that a precontract *per verba de præsenti*, consummated, was more binding than a solemnized marriage consummated and followed by issue.

The innovation which Henry had made in the law as to Precontracts, limited as it thus was, did not long remain in force. By stat. 2 & 3 Edward VI. c. 23, (A. D. 1548,) it was "reduced to the state and order of the King's Eccle- "siastical laws of this realm, which immediately before the "making of the said statute (32 Hen. VIII. c. 38,) in this "case were used in this realm." And it was enacted, "that "when any cause or *contract* of *marriage* should be pre- "tended to have been made, it should be lawful to the "King's Ecclesiastical judge to hear and examine the same; "and having the said *contract* sufficiently and lawfully "proved before him, to give sentence *for matrimony*, com- "manding solemnization, cohabitation, consummation, and "tractation, as in times past, before the said statute, the "King's Ecclesiastical judge, by the King's Ecclesiastical "Laws, ought and might have done."

Here it is suggested, (Opins. p. 9,) that the language of the Legislature implies a marked distinction between contract and matrimony. I own I do not see that. The contract is first described as a contract *of marriage:* surely that may as well signify a contract of present marriage, as a contract of future marriage. But then it is added that when the contract is proved "the judge must give sen-

" tence *for matrimony;*" by which I understand, that as the one party contends, that the contract is matrimony and the other that it is not, if the proof be in favour of the former, the judge must pronounce for matrimony, i. e. *that the matrimony is proved.* It is true, that the judge is to go further, and order solemnization, and other proper accompaniments and consequences of matrimony; but that is because the Church requires them to be performed (in the words of Scotus) " as something sacramental pertaining to " the adorning of the Sacrament." In short, the law was replaced exactly on the footing, on which it stood before King Henry's statute concerning precontracts: and what that footing was I have so fully shown, that I need not now repeat it. As to its being called " the King's Ecclesiastical Law," (Opins. p. 9,) that was a necessary consequence of the King's assumption of the title of " head of the Church," only seventeen years before; and proves nothing whatever concerning the practice of the three preceding centuries.

It has been observed, (Opins. p. 6,) that words of present consent are found in the Ritual of the Church of England, as established by the authority of parliament (A. D. 1548,) (stat. 2 & 3 Ed. VI. c. 1,) and that the Council of Trent directs the priest to say " Ego vos conjungo, &c.;" from which facts it would seem to be inferred, that neither the Roman, nor the English Church, considered the bond of marriage to exist until the solemnization. But it was admitted that the English form was taken from rituals of much higher antiquity: and yet we have seen, that, in those early periods, private precontracts prevailed over public solemnizations. As to the words " Ego vos conjungo," the Roman divines hold them to signify " conjunctos vos esse declaro," or approbo conjunctionem vestram, (Sanchez, 2, 6, 2) Indeed, the council of Trent would otherwise contradict itself, when it declares clandestine marriages to be true matrimony.

Down to the end of King Henry's reign (1547) Marriage was clearly held, in England, to be a sacrament: and it was in the same year reckoned among the Seven Sacraments by the Council of Trent. But early in the reign of Edward VI. (A. D. 1550) the "*Reformatio Legum*," which was drawn up chiefly under Cranmer's direction, declared that Baptism and the Lord's Supper were the *only* true Sacraments. Still it treated marriage as a *spiritual* act, and therefore subject to the laws of the Church; and now, for the first time, it required, for the validity of marriage, banns and a ritual celebration. It also enumerated various impediments to marriage, among which was the being enervated and bewitched by enchantment. But this document *never received a legal sanction*, either from the Church or the State. The Synod of London (1552), though specifying Baptism and the Lord's Supper as Sacraments, did not expressly exclude matrimony from that category, much less declare it null, for want of solemnization.

The reign of Queen Mary produced a momentary reflux in the history of our ecclesiastical laws. Papal supremacy was re-established, and matrimony again became a sacrament. By statute 1 Mar. sess. 3, c. 1, (A. D. 1553,) the "*regal* power" was declared to be "as fully in her "Majesty as in any of her noble ancestors;" but great care was taken to avoid ascribing to her any *spiritual* authority. Shortly afterwards Cardinal Pole was received as the Pope's Legate, and the Parliament (by stat. 1 & 2 Phil. & Mar. c. 8) not only avowed "*perfect obedience*" to be due, "both from the spiritualty and temporalty of the "realm," to "the See Apostolic and to the Pope's holiness "governing the same;" but formally recognised "the "*supremacy* of the Apostolic See," and repealed all acts made subsequently to 1528 in its derogation. If "old "authentic histories and chronicles" could be held conclu-

sive, on such a point, it is to be feared, that this statute might have been better justified than that of King Henry, which professed to be founded on the like evidence. But the truth of history is one thing; and that justice, which ought to govern the concerns of states and people, is another, and often a very different thing.

By statute (1 Mar. sess. 2, c. 2, A. D. 1553) the administration of the sacraments (and, consequently, of matrimony) was restored to the state, in which it had stood in the last year of King Henry VIII. And as there had been many marriages formed during the intervening period, which, though allowed by the statutes of the realm, were invalid by the papal law, by reason of consanguinity, affinity, and the like, the parliament, for the sake of public peace and quiet, desired that these should be confirmed by the Legate; tacitly admitting that they themselves, after their submission to the Pope, had no such power. The Legate, acceding to their wish, treated these unions as *matrimonia per verba de præsenti*, and granted dispensations as to the canonical impediments, (stat. 1 & 2 Phil. & Mar. c. 8, s. 32). From a subsequent statute (1 Eliz. c. 1, s. 39) we learn that Cardinal Pole, in the exercise of his legantine functions, appointed Judges Delegate in matrimonial causes, from whose judgments an appeal lay directly to the court of Rome.

On the accession of Queen Elizabeth, the Reformation resumed its course. The first statute of the new reign (stat. 1 Eliz. c. 1) (A. D. 1558) professing to restore to the crown "the *ancient* jurisdiction over the estate ecclesiastical," repealed the act asserting the Pope's supremacy, and revived many of the acts recently repealed. The jurisdiction, in matrimonial causes, now reverted into the channel, in which it had flowed from 1532 to 1553: and the law relating to them was again governed by the revived statute of 25 Hen. VIII. c. 19. The Act of Uniformity

(stat. 1 Eliz. c. 2) sanctioned the ritual, nearly as it now exists under stat. 13 & 14 Car. II. c. 4, and in 1562 the Thirty-nine Articles of the Church of England (differing somewhat from those of 1552 abovementioned) took their present form. By the 25th Article, marriage was expressly declared not to be a sacrament. But still it was regarded (at least among members of the English Church) as something more than a civil contract; for the Ritual described it as "a holy state," "consecrated by God to such an "excellent *mystery*, that in it is signified and represented "the spiritual marriage and unity betwixt Christ and his "Church." The law left it (as a spiritual act) under the ecclesiastical jurisdiction; and the Church also, considering it as spiritual, enjoined banns, consent of parents, and a ritual celebration; but neither statute nor church law anywhere declared it null for defect of any, or all, of these solemnities.

From this state of the law, it might be expected to follow, that if A. should contract matrimony *per verba de præsenti* with B., a female, who should afterwards marry C. *in facie ecclesiæ;* and A. should then proceed in the Ecclesiastical Court, he would recover B. as his wife, by sentence of the Ordinary; for this (be it observed) is merely the converse of the case in Coke Littleton, of the year 1282, the man contracting the two marriages in that case, and the woman in this. Now we have these very circumstances, and this very result, in *Bunting* v. *Lepingwell* (4 Coke, 29 a) (A. D. 1586); for John Bunting (A.) contracts *per verba de præsenti* with Agnes Addishall (B.), who afterwards takes to husband Thomas Twede, (C.), and Bunting then sues Agnes in the Court of Audience (of the Archbishop of Canterbury), and not only does he *recover her as his wife*, by sentence of the Ordinary, but that sentence goes on to declare that her subsequent marriage with Twede is a *nullity*.

What are the objections made here? First, it is said, (Opins. p. 5) that in a subsequent action of trespass at common law, Charles Bunting, the son of John Bunting, and Agnes, was found by a jury to be legitimate. Why, this goes in affirmance of the Ordinary's sentence. But even if the jury had found a contrary verdict, how could that have disturbed the judgment of the competent court? Were the jurors judges of appeal from the Archbishop? Then it is said, that the common law judges called for civilians to argue the case before them, which they would not have done if it had been clear that a contract *per verba de præsenti* was what the common law then recognised as an actual marriage, (Opins. p. 6). When we consider how this matter of precontract had been bandied about by the contradictory legislation of Henry, Edward, Mary, and Elizabeth, some doubt on it would have been by no means wonderful. But it seems, that the doubt of the judges did not turn on this point; but on the regularity or irregularity of the sentence, in declaring Twede's marriage null, without having first made him a party in the cause by citation; and the civilians satisfied them that the proceedings in the spiritual court were regular. Lastly, it is said, that the Ecclesiastical Court decreed "quod prædicta Agnes *subiret matrimonium* "cum præfato Bunting:" and thence it is inferred that even by the ecclesiastical law, as administered in England, such a contract was not held to constitute a *complete* marriage, (Ibid). If the words *subiret matrimonium* are merely (as is most probable) those of the common law reporter, I must protest against any inference whatever being drawn from them, regarding the ecclesiastical practice. But taking them even to have been part of the sentence, and to have intended that Agnes should go through a solemnization of marriage, and even that without such solemnization her marriage would not be complete

in form, what was it in its incomplete state? It was clearly a *marriage* in substance firm enough to bind her to Bunting for life, and even to nullify the marriage, so much more complete in form, which she afterwards contracted with Twede. Of the recognition by the common law I shall speak hereafter.

I have observed, that a divorce *causâ præcontractûs* necessarily implies that a precontract *per verba de præsenti* is a firmer bond (and therefore more truly matrimony) than a marriage subsequently solemnized in the face of the Church: and that such divorces frequently occurred before the Reformation. But they did not cease from that period. The very year after Bunting's case (viz. 1587), I find that of Hampden's daughter. The daughter of Edward Hampden, "*post annos nubiles, contracted matrimony* with William "Ditton, and after married with John Croke." The marriage with Croke was subsequently "dissolved by divorce "*causâ præcontractûs.*" (2 Co. Inst. 93.)

But our information of the state of the Ecclesiastical Law, at this period, does not rest alone on incidental notices in the common law books; for we have a very distinct account of it, both in testamentary and matrimonial causes, from the pen of the learned *Henry Swinburne*, who was judge of the Prerogative Court of York in the latter part of Queen Elizabeth's reign. In his work, entitled "A Treatise of Spousals," he uses the words "spousals" for any contract of marriage present or future, as was the custom of some canonists in his day; but on the binding effect of a consent *de præsenti*, he expressly says, "Spousals *de præsenti*, "though not consummate, be, in truth and substance, *very* "*matrimony.*" (Spousals, § 4, n. 4.)

Such a principle so enunciated, by an ecclesiastical judge of great experience, would be alone conclusive. However, he thus follows it out into its legal consequences:

"1. That woman and that man, which have contracted

"spousals *de præsenti*, as '*I do take thee to my wife*,' and "'*I do take thee to my husband*,' cannot by any agreement "dissolve those spousals; but are reputed for very hus- "band and wife, in respect of the substance and indis- "soluble knot of matrimony." (§ 4, n. 2.)

"2. Therefore, if either of them should, in fact, proceed "to solemnize matrimony with any other person, consum- "mating the same by carnal copulation, and procreation of "children, this matrimony is to be dissolved as unlawful." (Ibid.)

"3. The parties marrying to be punished as adulterers." (Ibid.)

"4. And their issue in danger of bastardy." (Ibid.)

"The reason is" (says he), "because here is no *promise* of "any future act, but a *present and perfect consent*, the "which alone *maketh matrimony*, without either public "*solemnization* or carnal copulation; for neither is the one "nor the other of the essence of matrimony, but *consent* "*only*." (Ib. n. 3.)

Swinburne grounds his doctrines on the authority of the ecclesiastical laws in force in his time; and what these were, he elsewhere thus explains, with reference to the statute 25 Hen. VIII. c. 19: "I mean those ecclesiastical "laws which being not any way prejudicial or hurtful to "the prerogative royal, nor repugnant to the laws, statutes, "or customs of this realm, but agreeing (with these) peace- "ably amongst themselves, and shaking hands together "like friends, and like loving brethren saluting and em- "bracing each other, may now still be executed, as they "were before the making of the said act." Accordingly he cites (as Zouch and Godolphin, who wrote somewhat later, do) various passages from the Decretum and the Decretals: and particularly, in support of the doctrines on *consent de præsenti*, he refers (among others) to these: "Cùm sufficiat ad matrimonium *solus consensus* illorum,

" de quorum, quarumque conjunctionibus agitur." (Decretal. 4, 1, 23.) " Contrahens successivè *per verba de* " *præsenti* cum duabus, tenetur adhærere primæ." (Decretal. 4, 4, 1.) " Clandestina conjugia contra leges quidem " fiunt; tamen contracta *dissolvi non possunt.*" (Decretum, 2, 30, 5, c. 8.), &c. &c. It is clear, therefore, that he had either never heard of the Ordinance of Lanfranc, or considered it (as all other ecclesiastical judges for several centuries had done) to be virtually " repealed by subsequent " constitutions of the Church."

On the other hand, he was well aware, that these unsolemn and irregular marriages were strongly discountenanced, as well by the temporal as by the spiritual authorities: " By the Common Law of this realm, like as it is in " France," says he, " spousals not only *de futuro*, but *de* " *præsenti*, be destitute of many legal effects, wherewith " marriage solemnized doth abound, whether we respect " legitimation of issue, alteration of property in her goods, " or right of dower in the husband's lands." (Spous. p. 15.) But yet this did not prevent his holding a consent *de præsenti* to be " very matrimony."

Contemporary with Swinburne was the Jesuit Sanchez, whose voluminous work, *De Sacramento Matrimonii*, is quoted to this day in our Ecclesiastical Courts. He enters minutely into the Law of the Church, both before and after the Council of Trent. He cites and adopts the doctrines of St. Thomas and Scotus above stated, and expressly lays it down:

" 1. That marriage was raised by Christ to the dignity " of a sacrament." (S. M. 2, 4, 1.)

" 2. That the priest is not the minister of this sacrament; " but the contracting parties are the ministers reciprocally " perfecting the sacrament." (Ib. 2, 6, 2.)

" 3. That no other external acts are necessary on their " part but words." (Ib. 2, 5, 6.)

"4. That words of present time do, by their own nature, "constitute marriage." (Ib. 1, 20, 1.)

"5. And lastly, that the words of the priest are not of "the essence of marriage; and even though they should "be wholly omitted, the marriage would still be valid." (Ib. 2, 6, 2.)

Shortly before the work of Sanchez appeared, the Synod of 1597 was held at London, in which the *Ecclesiastical Constitutions* were made. Among these was one regulating the grant of marriage licences. It ordained that the parties applying for a licence should give *bond* that no impediment to the marriage existed on the ground of "*precontract*, con- "sanguinity, affinity, or any other lawful cause." The divines, therefore, considered a precontract as no less an impediment to a subsequent marriage than consanguinity or affinity, which, in their view of the subject, rendered a marriage null and void *ab initio*.

The same view of the force and efficacy of precontracts results, yet more distinctly, from the Canons of 1603, still in force. The 62nd Canon imposes a heavy penalty on a minister celebrating marriage without previous banns or licence, and consent of parents. The 100th prohibits minors from marrying without such consent. The 102nd requires the same bond against the existence of a precontract as was required by the Constitutions of 1597, and in the same terms. The 103rd requires an *oath* to the same effect. The 104th declares marriage licences obtained by fraud null, and the parties married under them punishable, *as for clandestine marriage*. And the 105th directs that marriages shall not be dissolved on confession alone, "*especially if they have been solemnized*," a distinction which clearly infers that there may be indissoluble marriages *without solemnization*. Yet notwithstanding all these prohibitions, there is no declaration that marriages contracted by consent alone are *null*. And this is the more remarkable, because

the 99th Canon, which forbids marriages within the prohibited degrees of consanguinity and affinity, does expressly order that *they* shall be dissolved "*as from the beginning* "*void or null.*"

Notwithstanding this connected chain of authorities to the beginning of the seventeenth century, it is surmised, that in 1660 the Ecclesiastical Court did not hold a contract *per verba de præsenti* to be an actual marriage without any religious ceremony. The suggestion rests on no decided case, nor on any textual authority, but is simply inferred, as matter of reasoning, from the provisions of a certain statute (12 Car. II. c. 33—Opins. p. 9), which, it is said, would otherwise be inconsistent, or nugatory. I apprehend, that arguments of that kind will have no very great weight with your Lordship. You have had occasion to observe, in our numerous acts of Parliament, too many slips, oversights and errors, to suppose that English legislation is always a product of "the pure reason." In the present instance, however, the statute may well be defended, without admitting the consequence, which is attempted to be drawn from it. What are the facts? During the Commonwealth an ordinance was passed, allowing marriages to be solemnized before a justice of peace, containing a form of present consent to be used on such occasions, and giving to marriages so celebrated the same legal effect as the old law had given to marriages solemnized in Church. On the Restoration the laws of the Commonwealth became a dead letter, and it was reasonably enough doubted, whether marriages celebrated under them would entitle the parties to the legal benefits of dower, thirds, and the like. To quiet this alarm, the statute of 1660 enacted, that all such marriages should be of the same and no other effect as if they had been solemnized according to the rites of the Church of England. What was the effect of this law? It was not to make a consent *de præsenti* more or less valid,

as a marriage, than it had been previously; but to make a consent pronounced before a magistrate convey the same *common law rights* as a consent pronounced in the Church did under the old law. It prevented the Ecclesiastical Court, indeed, from compelling a new solemnization, and from punishing the parties for not solemnizing or for living in fornication; but it left the Ecclesiastical law relating to consent *de præsenti* (abstractedly from the form of giving it) exactly as it stood before. The statute relieved persons who had acted under the sanction of a government *de facto*, from apprehensions of severity on the part of the government *de jure*, and in this view it was equally just and politic, and resembled Cardinal Pole's confirmation of marriages in 1554.

One section of the statute provides, that issues on the point of bastardy, or lawfulness of marriage, depending on these marriages, should be tried by a jury. Hereupon it is asked, "Why not let them go, as before, to the Ecclesiastical Court?" To which I answer by another question, Why send them to the Ecclesiastical Court? One tribunal does not usually call on another for aid in doing what it can do as well itself. In former cases, the lay judge called on the ecclesiastical judge to inform him what effect an alleged contract *de præsenti* had by the law of the Church, of which law he, the layman, was professionally ignorant. Here the jurors could easily say, whether or not it was proved, that a certain man and woman had appeared before a justice of peace and uttered certain words, and if so, the Court could as easily direct them, that this was a marriage according to the statute; whether or not it was such by the law of the Church, was a question, which neither judge nor jury had any thing to do with.

It is somewhat remarkable, that a doubt should now be raised, whether in the year 1660 the contract *per verba de præsenti* alone would have been held by the law of the

Ecclesiastical Court to be an actual marriage, because that was the very year of *Sir Robert Paine's case* (1 Siderfin, 13). Now, in that case, although there was a difference of opinion between Serjeant Windham and the Attorney-General Noy on one side, and Justice Twisden on the other, as to the common law effect of a sentence in the Ecclesiastical Court, yet they all assumed it as matter of notoriety, that if a man contracted with a woman to marry her, and afterwards married another, and the first woman sued in the Spiritual Court, sentence would there be given that the man and the first woman were husband and wife.

Of the Ecclesiastical proceedings of that day it would now be difficult to obtain any full and precise information, for want of reports printed or manuscript; however, there are some old records existing in Doctors' Commons, from which the forms of pleading, at least, and the evidence in particular cases, may be collected. Of these I shall mention a few, which I have heretofore had occasion to examine.

One of the most ancient cases extant is that of *Bee* v. *Martin*, introduced into the High Court of Delegates on appeal in 1666. It was a suit founded on a contract of marriage between the parties, without the intervention of a priest, in these words:—" I, Edward Bee, do, in the pre-" sence of God, yield my assent and consent, in marriage, " unto you Sarah Moore, and acknowledge you to be the " only wife of my youthful affections." The libel pleads a courtship of several successive months, in the course of which it is alleged that the parties " *matrimonium verum,* " *purum, et legitimum, per verba de præsenti* ad hoc apta ad " invicem contraxerunt;" and the concluding prayer is in these words: " petit pars ista pro viribus et valore *matri-* " *monii veri, puri, et legitimi,* inter præfatos E. B. et S. M. " habiti, facti, et contracti pronunciari et declarari; præ-" fatamque S. M. ad solemnizandum dictum matrimonium,

" in facie Ecclesiæ, juxta ritus Ecclesiæ Anglicanæ, cogi et " compelli." As the forms of pleading are generally accommodated to the prevalent notions of law at the time, the plea in this case affords a strong inference, that the Ecclesiastical Court, agreeably to the doctrines of Swinburne, held a consent *de præsenti* antecedently to solemnization, and without any sacerdotal benediction, to be true, pure and lawful marriage.

The case of *Henshaw* v. *Wettenhall*, which occurred not long afterwards in the same Court, at least justifies the late Sir John Nicholl in asserting, " that marriages in England " were proveable by *circumstantial evidence* prior to the " Marriage Act." (1 Add. 65.) It was a case of jactitation, in which the defendant justified by alleging a marriage, and it is thus noticed in a MS. book of Dr. Andrews, in the Library of Doctors' Commons:—" Marriage proved by " presumption, in the case of *Henshaw* contra *Wettenhall*, " T. T. Aº. 1677."

Now there could hardly be occasion for circumstantial evidence of a publicly solemnized marriage, for there the marriage register and the identity together would be conclusive; a marriage proved by presumption must, therefore, be a clandestine one. Clandestine marriages, it is true, were frequently celebrated by the intervention of a priest, which seems to have been the case here; but how did that affect the law of the case? Doubtless, it might have happened that the English Ecclesiastical Courts had adopted some arbitrary rule, unknown to those of the Continent, by which sacerdotal benediction, unaccompanied with any other canonical requisite, would have been held to convert a consent *de præsenti*, otherwise invalid, into a valid marriage; but where is that rule to be found?—and what proof is there that any ecclesiastical judge ever took it for his guidance? A party, indeed, suing on a contract so made, would naturally plead the priest's blessing, as an

acquiescence, *pro tanto*, with the injunctions of the Church, as proof of a religious feeling, and as part of the actual *res gesta*, on the ground of which he sought the aid of the Court, to acquire the valuable rights dependent on solemnization; but where is the proof, that without such plea the suit would have been dismissed?

The accession of King William and Queen Mary introduced a new era of religious freedom. Dissenters from the Established Church were formally recognised by stat. 1 Wil. & Mary, sess. 1, c. 18, (A. D. 1688): they were exempted from many penalties, and from prosecution in an Ecclesiastical Court for not conforming to the Church of England. It would seem that in the Temporal Courts, marriages contracted by Quakers and other sectarians, according to their own peculiar usages, were from this time treated as marriages *de facto;* but I am not aware that the practice respecting them in the Ecclesiastical Courts underwent any alteration.

The case of *Jesson* v. *Collins*, 2 Salk. 437, (A. D. 1705,) will require particular notice, when I come to speak of the recognitions of the Ecclesiastical Law of marriage by the Common Law authorities. At present, I shall only observe, that it proves a continuance of the same practice, as to precontracts, which we have seen followed in the earliest times; for in that case a libel had been given in to the Ecclesiastical Court, to annul a solemnized marriage by reason of a precontract. Had the practice of that Court allowed the rejection of such a libel, the remedy would have been short and easy; but as it did not, an attempt was made (but failed) to obtain a prohibition from the Queen's Bench.

*Haydon* v. *Gould*, 1 Salk. 119, (A. D. 1710,) is cited (Opins. p. 6) to prove that "by the English Ecclesiastical "Law a contract of marriage *per verba de præsenti* was not "alone sufficient to make the marriage complete." Now,

what were the circumstances? Haydon and his wife belonged to a sect of dissenters called Sabbatarians. They were married by a mere layman, in a Sabbatarian congregation, using the form in the Common Prayer-book, except the *ring*. They lived together seven years, when the wife died, and the husband took out administration to her in the Ecclesiastical Court. Gould and his wife, as next of kin to Haydon's wife, applied to the same Court to repeal the administration, which was done; and the repeal was confirmed by the High Court of Delegates. The Reporter says, "it was held, that as Haydon demanded a right to "himself as husband by the Ecclesiastical Law, he ought "to prove himself a husband by that law; and so the "Court ruled." But what Court ruled it, *non constat;* certainly not the Delegates, for they never gave reasons for their judgment; and of the Courts below there are no distinct reports of that period extant. Neither have we any record of this pretended "rule" of the Court; nor can we tell in what words it was conceived, so as to deduce from them its intended effect. I am aware, that this marriage has been spoken of (incidentally) as null and void; but this is an incorrect expression. There never was any sentence pronouncing the marriage null and void. There could be no such sentence, in the reported case; for the absolute validity or invalidity of the marriage was not there in issue. The only question was whether the Court would grant to this man a right, which it had never before granted to any husband, who had not solemnized his marriage in the manner enjoined by the laws of the Church; and this it refused to do—No more. All that we are warranted to infer from such refusal is, that as a party should come into a Common Law Court with clean hands; and as he who seeks equity, in Chancery, must first do equity; so he who prays the aid of an Ecclesiastial Court, to exercise a right emanating from the Ecclesiastical Law, must

show that his title is not grounded on a contempt of that very law. It was said, that the constant form of pleading marriage was " per Presbyterum sacris ordinibus constitu- " tum." Doubtless this was the most frequent mode, because it must have most frequently coincided with the fact; but that it could not have been universally the case, in ancient times, is clear from the instances already referred to, and others which I shall presently mention.

We are not left, however, to loose reasoning on cases imperfectly reported; but can refer, for the state of the Ecclesiastical Law of marriage at this period, to textual writers of great authority. In 1726 was published the *Parergon Juris Canonici Anglicani*, by the very learned Dr. Ayliffe, who, as well as the civilians, his predecessors, Swinburne, Godolphin, Zouch, &c. constantly quotes those parts of the Papal Canon Law which had been received in England; and indeed he expressly says: " The *ancient* " *Canon Law* received in this realm is the *law of the king-* " *dom in Ecclesiastical cases*, if it be not repugnant to the " royal prerogative, or to the customs, laws, and statute of " the realm." In the chapter entitled " Of Marriage, or " Matrimony, otherwise called *Wedlock*," he speaks of " espousals *de præsenti*, commonly called *marriage*," and further adds: " The principal thing required to a legal " marriage is the *consent* of the parties contracting, which " is sufficient *alone* to establish such a marriage;" and again—" The Council of Trent declares all clandestine " marriages to be null and void; but this is *not law in* " *England*, our law only punishing such marriages with " the censures of the Church."

Oughton's *Ordo Judiciorum*, a work of the highest authority for the practice of the Ecclesiastical Courts, and recommended at the time by all the bishops, the lord keeper, the common law judges, and the bench and bar of Doctors' Commons, appears to have been written in the

year 1733. He, in many places, speaks of a contract *per verba de præsenti* as true marriage: for example—

" Si juvenis cum fœminâ tractaverit de matrimonio con-
" trahendo, vel forsan contraxerit sponsalia *de futuro*, sed
" non contraxerit *verum matrimonium, per verba de præ-*
" *senti*, (tum) si fœmina jactitaverit et affirmaverit dictum
" juvenem cum eâ *matrimonium per verba de præsenti* con-
" traxisse, et eum ejus maritum, seque ipsius juvenis con-
" jugem esse, juvenis iste potest agere contra hanc mu-
" lierem, in causâ jactitationis matrimonii." (Tit. 193, n. 16.)

" Si actor probaverit partem ream dixisse, seu jactitâsse
" se *matrimonium* cum actore contraxisse, et pars rea non
" allegaverit et probaverit se justè ita dixisse et jactitâsse,
" scilicet quia reverà *matrimonium* fuit inter eos *per verba*
" *de præsenti* contractum, ferenda est sententia pro actore."
(Tit. 194, n. 3.)

" Si pars rea probaverit se justè jactitâsse, id est, se
" *matrimonium de præsenti* cum actore contraxisse, pronun-
" ciandum est in unâ eâdemque sententiâ, non solùm ac-
" torem defecisse in probatione libelli—verùm etiam pro-
" nunciandum est *pro hujusmodi matrimonio* allegato, prout
" pronunciari solet in causâ matrimoniali originaliter insti-
" tutâ." (Tit. 195, n. 4.)

That the practice of the Ecclesiastical Courts was conformable to the doctrines of Swinburne, Ayliffe, and Oughton seems, at this time, also to have been matter of general notoriety, from *Holt* v. *Ward* (2 Str. 937) (A. D. 1732). Mr. Ward and Mrs. Holt made a contract *per verba de futuro*, without *copula*, and on his marrying another woman, Mrs. Holt brought an action against him at Common Law for breach of promise. After verdict for her, and argument several times at the bar, the Court appointed an argument by Civilians; in the course of which it was said, by those who argued for the defendant, " that the only reason why they (the Ecclesiastical Judges)

" hold jurisdiction, in the case of a contract *per verba de* " *præsenti*, was because *that* is looked upon, amongst " them, to be *ipsum matrimonium*: and they only decree " the *formality* of a solemnization in the face of the " Church." Now, if this had been contrary to the law and practice of the Ecclesiastical Court, it would surely have been contradicted by the Civilians on the other side. Who they were does not appear; but the Bar at Doctors' Commons could then boast several members who have left a high reputation, as Sir Nathaniel Lloyd, Sir George Paul, Drs. Pinfold, Strahan, Andrew, &c., one or more of whom were probably employed on this occasion.

In the same year, 1732, occurred the case of *Leeson* v. *Lord William Fitzmaurice*, noticed by Lord Stowell in the Dalrymple judgment. This was a suit to establish a marriage *per verba de præsenti* without the intervention of a priest: the facts and the mode of pleading them being nearly similar to those in *Bee* v. *Martin*. It was alleged that the parties, on the 23d of June, 1724, bound each other by a contract *per verba de futuro*, and that on the 11th of July following, " animo sponsalia de præsenti sive " *verum, purum, et legitimum matrimonium*, per *verba de* " *præsenti* ad hoc apta, mutuum eorum consensum expri- " mentia, contrahendi, sibi invicem fidem dederunt;" and then the words were set forth, which the Delegates held to be conclusive.

The only case in the Ecclesiastical Courts of a Quaker's marriage, of which I have any correct information, is that of *Haswell* v. *Dodgshon*, which occurred about this time. Eliza Dodgshon, by libel, in the Consistory of Durham, pleaded that Haswell and herself were Quakers, and that they contracted a marriage in the manner observed by that Sect, namely, by public declaration at their monthly meetings; and she set forth certain words used on another occasion, containing a consent in present time; and prayed

that the marriage should be pronounced for and solemnization ordered. She prevailed successively at Durham and at York, whence Haswell appealed to the Delegates; but whether the case was there concluded, dropped, or compromised, I am not aware. It is to be observed, however, that the woman, though a Quaker, does not put the ceremonial of her sect on the footing of a regular marriage, but merely asserts a marriage by consent *de præsenti*; and that she therefore concludes, in the usual form, by praying that the man may be compelled to solemnize the marriage with her *in the face of the Church* (that is the Church of England). Probably, without such a prayer she would have been held to be barred (as contumaciously disobeying the injunctions of the Church) from claiming the aid of the Court, in the character of a wife: an observation, which applies to and explains the pleadings in all other suits on a precontract.

I shall notice only three more Ecclesiastical cases prior to the Marriage Act of 1753, viz. *Wescombe* v. *Dods*, *Bavington* v. *Bavington*, and *Scrimshire* v. *Scrimshire*, of which the first is mentioned in Sir G. Lee's Reports, and the last in Dr. Haggard's, but the second is unpublished.

1. The case of *Wescombe* v. *Dods*, in the Consistory of London, 1751, was a proceeding by William Wescombe against Rebecca Dods, calling herself Wescombe, for jactitation of marriage with him: to which the woman answered by pleading a marriage in Scotland, and the proof was, that these parties had been married clandestinely, in a private house, in Edinburgh, by one David Paterson, a degraded and excommunicated minister of the Church of Scotland. The sentence by Dr. (afterwards Sir E.) Simpson (19th February, 1751), pronounced, decreed, and declared "that the said William Wescombe and Rebecca "Wescombe, falsely called Dods, being both free from all "matrimonial contracts, did, at the time and place pleaded

" in this cause, mutually contract *true, pure, and lawful* " *matrimony,* in *words of present time,* to and with each " other, and did, on or about the 26th day of March, in " the year of our Lord 1741, rightly, duly, and lawfully " solemnize, or procure the same to be solemnized, and did " afterwards consummate the same, &c."—and the sentence concluded, " we pronounce, decree, and declare the said " William Wescombe and Rebecca Wescombe, falsely " called Dods, to be lawful husband and wife, to all effects " and purposes in the law whatsoever." And this sentence was confirmed by Sir G. Lee, Dean of the Arches, 21st February, 1752; agreeably to Oughton, t. 195, n. 4.

2. In the case of *Bavington* v. *Bavington,* in the Consistory of London, 1752, the proceeding was by *Ann Grace,* otherwise *Bavington,* to have her marriage with William Bavington (which had been formally solemnized in England) pronounced null and void, by reason of a former marriage in Scotland by the rites of the Scotch Church with one Elizabeth Mason, living at the time of the second marriage. The sentence by Dr. Simpson (26th June, 1752) pronounced, decreed, and declared, " That William " Bavington, being a bachelor or single man, and Elizabeth " Mason, relict of Andrew Mason, being a single woman, " and both of them free from all matrimonial contracts or " espousals, did, at the time and place libellate, contract " *true, pure, and lawful matrimony* between each other, " and did solemnize or cause the same to be *solemnized,* " and afterwards consummated"—and then the sentence went on to pronounce for the validity of that marriage, and that the said William Bavington had unlawfully contracted a subsequent marriage with the said Ann Bavington, otherwise Grace, the said Elizabeth Mason being then living, and to pronounce the latter marriage to be null and void. In this sentence, however, a very peculiar circumstance occurred. The document, as drawn by counsel, and

porrected in the usual manner by the Proctor to the Judge, had inserted, after the word "solemnized," "*in the face of* "*the Church*," but these latter words appear to have been struck out by the Judge.

3. *Scrimshire* v. *Scrimshire.*

This was a suit begun in the Consistory of London in 1749 by the woman for restitution of conjugal rights, to which the man pleaded the nullity of the marriage by the laws of France, where it was contracted. The case was much litigated, principally on the French law, and finally, on the 29th of July, 1752, the judge dismissed the complainant, and condemned her in 400*l. nomine expensarum.*

These three, it will be observed, were all cases of marriage contracted out of the realm of England; and therefore, according to principles since established in our Ecclesiastical Courts, if proved to have been valid according to the law of the place of contract, they must have been held valid in England *on that ground.* But that ground was not distinctly taken in either of the two first cases. Indeed, if the law of Scotland, as to marriage, had then been pleaded and proved, it might have saved an infinity of trouble and expense in the subsequent cases of *Beamish* v. *Beamish*, and *Dalrymple* v. *Dalrymple.* It is true, that in Wescombe's case, Dods in a supplementary allegation pleaded a sentence of the Commissary Court in Scotland in 1742, affirming her marriage; but as neither party put the general law of Scotland in issue in England; as Wescombe did not produce witnesses in Scotland; as a single sentence of a subordinate Court could not prove the Scotch law; and moreover, as a question of some difficulty had been raised respecting Wescombe's amenability to the Scotch jurisdiction; it seems, that neither Dr. Simpson nor Sir G. Lee could safely or prudently have grounded his sentence on the *lex loci.* Nor does it appear, from the sentences themselves, that either of them did so. Sufficient

to them was it, that the parties were proved to have formed a contract "in words of present time," which the English Ecclesiastical Courts held to be "true, pure, and lawful matrimony," and that such matrimony was not proved to be invalid by the law of the place where it was formed. The sentence goes on to say, that the parties solemnized and consummated "*the same*," that is, "*the matrimony*," already declared to have been "true, pure, and lawful:" and as the consummation was confessedly not essential to the validity of the marriage, so neither was the solemnization. Observe too, that the solemnization is not pronounced to have been "in the face of the Church;" for in the then style of the English Ecclesiastical Courts, the word "Church" so used must have been taken to intend "the Church of England." Nor is it said to have been in the presence of a "person in holy orders;" for, as is justly observed by Sir N. Tindal, (Opins. p. 14,) "that expression "could point to those persons only who had received epis- "copal ordination."

In Bavington's case, the Scotch law was still less in question; for there was no sentence of a Scotch Court pleaded; and though the marriage was said to be had by the rites of the Scotch Church, that was not a point particularly considered by the English Court, or which could have determined its judgment. Nothing was either pleaded or proved, which could lead to the judicial conclusion that the parties had contracted "true, pure, and lawful matrimony," except their present consent, not in the presence of a person in holy orders, and (as the judge's cancellation very strikingly intimated) not in the face of the Church. This therefore was simply a case of precontract, *per verba de præsenti*, but of a precontract so forcible in its operation, as to render null and void a subsequent marriage fortified by publication of banns, celebration at a due time, and in a sacred place, intervention of a minister in holy orders,

and all other the rites and ceremonies of the Church of England.

In Scrimshire's case, the foreign law was distinctly pleaded, as the ground of the nullity of the marriage; and so far as I know or believe, it was the first time that that point came to be fully considered in any of our Ecclesiastical Courts. The principle is one, which admits of various exceptions; and therefore, when new to any tribunal, it must naturally be received with some hesitation. Accordingly, the case was argued, in the Consistory, for three days; then the judge, after some weeks' deliberation, heard a further argument; and it is said, that previously to pronouncing sentence, he consulted with Lord Hardwicke. Be this as it may, the reasons of the sentence (of which my learned friend Dr. Haggard has published a full note taken at the time) turn almost entirely on the propriety of deciding a matrimonial cause, in an English Court, by a foreign law; and I should not have noticed them, but for some expressions, which incidentally fell from Sir Edward Simpson in delivering judgment.

In the first place, he says expressly "the *Canon Law* "*received here* calls an absolute contract *ipsum matrimo-* "*nium.*" He therefore agrees with all preceding authorities, that such was the Ecclesiastical Law *of England.* He adds, "and will enforce solemnization according to English "rites." This also we have seen to be the settled practice of the Courts. But Mr. Scrimshire's was a clandestine marriage, celebrated between Protestants by a Roman Catholic priest, according to the Roman Catholic ritual. What would that have amounted to by the English Ecclesiastical Law? He answers: "The Roman ritual not "being the same as ours, such a ceremony is nothing more "than a contract." The principle here enunciated is equally applicable to the Scotch celebrations in the cases of Wescombe and Bavington. Those celebrations also were

nothing more than contracts; but such contracts as Sir E. Simpson himself held to be *ipsa matrimonia.*

He shows, indeed, that these irregular marriages were discountenanced both by the spiritual and temporal law. First, as to the ecclesiastical practice, "That contract, or "*ipsum matrimonium,*" says he, "does not convey a legal "right to restitution of conjugal rights, though an English "priest had intervened, if it were otherwise than according "to the English ritual." This is analogous to the rule in Haydon's case. The Court will not lend its aid to a person in a state of contumacy. Secondly, as to the Common Law rights, "I apprehend," (says he,) "unless persons in "England are married according to the rites of the Church "of England, they are not entitled to the privileges at- "tending legal marriages, as thirds, dower, &c." He even expresses a doubt, whether a Bishop could certify to the Common Law judges, that the parties were lawfully married; but that doubt manifestly has reference to what the Bishop was required by the Temporal Court to certify, not at all to the actual validity of the marriage bond.

The proceedings in Parliament, for nearly a century prior to 1753, attest the difficulty, that was felt in attempting to annul marriages for want of solemnization. Serious as the evils of clandestinity, in the formation of the conjugal union, were always felt to be, yet it was thought by the great majority of all classes, that human legislation could not separate those whom God had joined, and that persons who had taken each other as husband and wife before God were joined in marriage by God. Hence, although bills to prevent clandestine marriages were brought into one or the other House of Parliament in 1666, 1667, 1678, 1685, and 1689, none of them contained a nullifying clause. Such a clause was introduced, for the first time, into a Bill in 1690; but this like all the preceding attempts failed; as did the Bills brought in, in 1691, 1697, 1718, and 1733.

4. I arrive at the last period, which I proposed to trace, in the history of this branch of our Ecclesiastical Laws—the period beginning with the act of 1753 (stat. 26 Geo. II. c. 33), entitled "An Act for the better preventing of Clan-"destine Marriages."

My Lord, upon the wording of this statute an argument has been raised, which your Lordship will expect me to notice. It is said (Opins. p. 10), that the only clause which affects these contracts (*per verba de præsenti*) is the thirteenth, which does not annul them, but only enacts, "that no suit or proceeding shall be had in any Ecclesias-"tical Court, in order to compel a celebration of any "marriage *in facie ecclesiæ*, by reason of any contract of "matrimony whatsoever, whether *per verba de præsenti*, "or *per verba de futuro*, which shall be entered into after "the 25th of March, 1754." And hence it is inferred,—

1. "That these contracts *per verba de præsenti* are still "lawful, though they cannot be enforced in an Ecclesias-"tical Court."

2. "That if these contracts did not, before and at the "time of passing the act, constitute a *valid* marriage, but "were only the necessary means—the basis for enforcing "the solemnization, there is then no injury in leaving them "as they were."

3. "But that if they ever constituted a *valid* marriage "of themselves, not being made null by this act, so do "they still."

4. "And then may some great and almost inextricable "difficulties occur from the absence of such a provision."

My Lord, I think, with great submission, that there are two modes of dealing with this argument. On the one hand, if it be admitted that the thirteenth is the only section of the act applicable to contracts *per verba de præsenti*, no doubt the inferences deduced from it will appear legitimate. But to what do they amount? Only to a

*reductio ad absurdum*, on the assumption, that the statute is throughout clear, consistent, and rational. Now, I have already said, that I do not think arguments of this kind, applied to English Acts of Parliament, are the most convincing that can possibly be urged. But how stands the matter with this particular statute? My Lord, it is notorious that no law of a domestic nature, prepared by men of so much talent and influence, was ever received by the public with such general dissatisfaction, was ever opposed so warmly in Parliament, or passed in so mangled and imperfect a state, as this lamentable Marriage Act! It was equally contrary to the principles of toleration established at the Revolution, and to the still higher sanctions of natural justice. Whilst it compelled all persons, however conscientiously dissenting from the English Church, either to profane her ritual by a lip-deep observance, or else to render their union a crime, and their children illegitimate; it took away from the deluded female, who had trusted her happiness and honour to the faith of a sworn contract in the face of God, the power which the Ecclesiastical Law had given her, of enforcing that contract by a suit to compel solemnization. True, she had still a remedy by action for damages (as in the case of *Holt* v. *Ward*, above-mentioned), but what was that, compared to one, which would have given her the public *status* of a wife, with all its rights and respectabilities!

My Lord, the iniquity of the act went much further; for it enabled a man to marry a woman solemnly in the face of the Church, with the approbation of both their fathers—to live with and acknowledge her publicly as his wife, and have issue by her—and *five and twenty years afterwards*, to bring a suit for annulling the marriage, on the ground that he himself had falsely and fraudulently sworn, in order to obtain the marriage licence, that she was twenty-one years of age, when she was, in fact, two months younger.

That was the case of *Hewitt* v. *Bratcher* (1809), in which I was counsel (with the late Master STEPHEN), before the High Court of Delegates: and that Court, by admitting the libel to proof, decided, that agreeably to the act of 1753, then in force, a marriage must, under such circumstances, be annulled! A law, which could thus operate against every sentiment of humanity and justice, might well present cases of "difficult solution." If, therefore, the statute, in its true construction, do not annul the matrimonial validity of a consent *de præsenti*, the defect may perhaps be ascribable to the confusion often resulting from contested legislation.

On the other hand, however, as we ought not unnecessarily to suppose error or absurdity in an Act of Parliament, but on the contrary should give its terms a large and liberal construction, if by so doing the remedial intent of the legislator can be the more effectually carried out, it may deserve consideration whether the eighth section of the act does not supply the want of a nullifying clause in the thirteenth. The eighth section recites that "many persons do solemnize matrimony in prisons and other places, without "banns or licence," and for the prevention thereof enacts, that "all marriages solemnized from and after the 25th "March, 1754, in any other place than a church or public "chapel, where banns have been usually published, unless "by special licence, or that shall be solemnized without "publication of banns or licence from a person or persons "having authority to grant the same first had and obtained, "shall be null and void to all intents and purposes whatsoever." Now, it is clear, that the word "solemnized" is not used here in its strict technical sense; for "solemnitas" is defined in the civil law "certa observatio verborum, personarum, vel temporis;" and when solemnization was decreed by the Ecclesiastical Court, it was to be according to the rites and ceremonies of the Church of England,

But what certain observance of words, persons, or times, could the act contemplate as used in prisons and other places? Certainly not all the rites and ceremonies of the Church of England. Did then the use of the ring constitute a solemnity? Did the presence of a degraded parson? Did the repeating of some, and what words, out of the Prayer Book? Did a mutual oath of the parties to each other; or a signed paper with or without seal or witnesses? All and each of these may be called, in a certain sense solemnities, and so may the use of the *solemnia verba*,—" I (M.) take thee (N.) to be my wife:" " I (N.) " take thee (M.) to be my husband:" and the law affords no criterion, by which a clandestine marriage can be said to be " solemnized" by the use of one of these forms, rather than another. Moreover, the statute observes no technical accuracy of distinction, even in speaking of the marriage ceremony regularly performed in Church; for in some sections it calls the ceremony "*solemnizing* marriage," in others, " *celebrating* marriage;" which latter phrase is of large extent in the Canon Law; for according to Lyndwood. " hæc dictio *celebrantes* potest referri tam ad eos, qui in- " vicem contrahunt, quàm ad eos, qui contractum solen- " nizant." (*Provinc.* L. 4, T. 3, gloss.) From these considerations, it seems not unreasonable to conclude, that the Legislature intended, by the eighth section, to annul all clandestine marriages howsoever formed. If therefore a contract *per verba de præsenti* was, previously to the act, deemed a marriage, its matrimonial effect was annulled by the act, and the supposed "inextricable difficulties" vanish,

My Lord, I have shown by a train of authorities, that such a contract *was* held by our Ecclesiastical Courts, for at least five centuries, to be *ipsum matrimonium;* but as that rule ceased to be law as to marriages contracted in England, from the 25th March, 1754, any questions on it could only arise afterwards, in those Courts, on marriages contracted abroad.

Among cases of that kind, the first which came before the Delegates was that of *Compton* v. *Bearcroft*, which was a suit for nullity, by reason of minority, founded on a marriage of two English persons in Scotland, in a private house, without banns or licence, but with the intervention of an English clergyman. The case is nowhere fully reported; but it is alluded to by *Sir G. Hay* in another case. It was first tried by him in the Court of Arches, 1766, and he rejected the libel, thereby affirming the marriage. He says, "the determination did not pass on the "ground that the marriage was valid in Scotland—nothing "was laid before the Court to show that the marriage *was* "valid in Scotland; but because the Act of Parliament "did not put any restraint upon English subjects being "married in Scotland, with respect to the consent of "parents. On that ground it is that those marriages are "held good, *not being contrary to the laws of England.*" This decision was confirmed by the Delegates in 1769; not as has been erroneously supposed, because the marriage was valid by the law of Scotland, for that law had neither been pleaded nor proved, but probably for the reasons alleged by Sir G. Hay.

*Harford* v. *Morris* was also a cause of nullity, by reason of minority, before Sir G. Hay. Mr. Morris ran away with Miss Harford to the continent, and married her, first at Ypres, by means of a Calvinistic chaplain, and afterwards at Ahrensberg, by means of a Lutheran pastor, and it was pleaded, and some proof given, that both marriages were null by the laws of the respective places. Sir G. Hay, in 1776, held, that there was a marriage *good by the law of England*, and that the parties being *in itinere* did not give jurisdiction to the local courts. He therefore rejected the libel, but the Delegates, in 1784, reversed the sentence, on the ground (as it was then understood) that the marriages were had by compulsion.

Sir G. Hay appears to have decided these two cases on the ground of the law of England, independently of the Marriage Act; and as they seem to have no common feature, but a contract *per verba de præsenti*, he must manifestly have considered with Swinburne, that such a contract "is in truth and substance very matrimony."

*Beamish* v. *Beamish* was a suit for restitution of conjugal rights, brought in the Consistory of London, and thence removed, on an appeal of grievance, to the Court of Arches. Mr. Beamish, a minor, being at Glasgow for education, entered into a contract of marriage *per verba de præsenti* with a Miss Smith of that city. On his deserting her, she instituted this suit, pleading that the contract was a valid marriage *by the Law of Scotland*, which law was proved on her part by the unopposed evidence of certain Scotch Lawyers. On this ground, Sir W. Wynne, in 1793, pronounced for the marriage, and his judgment was affirmed, in the following year, by the Delegates. The case of Beamish, therefore, related solely to the law of Scotland, and I mention it merely for the relation which it bears to that of Dalrymple, now to be noticed.

Mr. Dalrymple (afterwards Earl of Stair), an Englishman by birth, had formed in Scotland a secret contract of marriage *per verba de præsenti* with Miss Gordon, a Scotch lady; but afterwards coming to England, he in this country publicly married Miss Manners, by the rites of the Church of England. Miss Gordon thereupon brought a suit for restitution, in the Consistory of London, and pleaded the contract to be a valid marriage by the law of Scotland, which Mr. Dalrymple denied. The law of Scotland therefore, being a foreign law, was to be proved as a matter of fact; but the proof did not remain uncontroverted, as in the case of Beamish: on the contrary, the pleas and interrogatories branched out into many nice distinctions, and several eminent Scotch Lawyers were examined on both sides, who

appeared to differ considerably in their views of the law. In this state of the case, Lord Stowell had to find a criterion, by which he might educe the truth from evidence apparently contradictory; and such a criterion was supplied from the work of Sir Thomas Craig, a Scotch lawyer, who wrote soon after the Council of Trent, and who lays it down "that the whole question depends on the Pontifical "Law." (L. 2, dieg. 18, s. 17.) Here, then, Lord Stowell was on sure grounds. The Pontifical or Canon Law he declared to be (as it certainly was) "the basis of the ma-"trimonial law of Europe" (2 Hag. E. R. 67); and from thence he deduced the rule, "that in all instances, where "it is not proved, that the law of Scotland had resiled "from the Canon Law, the fair presumption is, that it "continues the same." (Ibid. 81.) Now "the Canon Law "considered (as he had before stated), that when the "natural and civil contract was formed, it had the full "essence of matrimony, without the intervention of a "priest." (Ibid. 64.) Therefore, as it was not in evidence before him, that the Scotch Law had resiled from this doctrine, he held it applicable to the marriage in question, which he pronounced to be valid; and his judgment was affirmed by the High Court of Delegates, though it necessarily annulled the subsequent marriage had with Miss Manners *in facie ecclesiæ*, just as had been done by the judgment of 1282, with the second marriage there mentioned.

It is true, that the case of Dalrymple related directly to the Scotch law alone, and therefore when Lord Stowell observed, "that the same doctrine was recognized by the "temporal courts, as the existing rule of the matrimonial "law of this country," (2 Hag. 68), he may be said perhaps, in some sense, to have spoken "extrajudicially." But I cannot admit, that the observation was "uncalled for," and still less, that it was founded merely on "the dictum

of Lord Holt," in *Jesson* v. *Collins*. When Lord Stowell was holding the balance between great Scotch lawyers on a question of Scotch law, and when, applying to their evidence the Canon Law as a test, he declared that to have been the basis of the matrimonial law of Europe, it surely was not "uncalled for" to show, that this was not merely an opinion taken up at the time, but a fact in legal history, recognized (as far as related to England) both by the Ecclesiastical and Temporal Courts. On the other hand, before he adverted to Lord Holt's dictum, he expressly cited the case of *Bunting* v. *Lepingwell* (A. D. 1586), as containing (virtually) a similar recognition. And though the high reputation of Lord Chief Justice Holt, the agreement of the whole bench in his dictum, and the forcible terms in which it was delivered, might naturally indicate it as an apt subject for further quotation: yet all who knew the deep research and extensive information of Lord Stowell, must be satisfied, that he was fully conversant with those ancient authorities in the *Common Law*, from which Lord Holt himself must have derived his opinions on this subject. As to the notion, that Lord Stowell could possibly owe to Lord Holt any part of his knowledge of the *Ecclesiastical Law*, it is one, which I apprehend, no person can ever seriously entertain.

At all events, we have the clear and deliberate opinion of Lord Stowell, that by the ancient Canon Law received in this realm, which (as Ayliffe justly remarks) was the law of the kingdom in Ecclesiastical cases, and which was in force down to 1753, a contract of marriage *per verba de præsenti*, between competent persons, was a valid marriage. Lord Stowell was not, indeed, at that moment, called upon to decide that precise point; but he gave it all the weight of his most unhesitating assertion, and it was wrought up with, and made an important part of the reasoning, in one of his most splendid pieces of judicial

eloquence. If he was mistaken, as to the effect of an English statute, passed in his own lifetime, what reliance could be placed on his judgment, in a disputed question of ancient and unwritten Scottish law? I may go further, and say, if the greatest Ecclesiastical Lawyer of his age, no less noted for caution in expressing, than for wisdom in forming his judgments, could err so grossly, on a point so peculiarly within the appropriate sphere of his own research and experience, where are we to look with confidence for legal accuracy?

In addition to the long list of preceding authorities in Ecclesiastical Law, by which Lord Stowell's doctrine is justified, I will only trouble your Lordship with one, of subsequent date. The late Dean of the Arches, Sir JOHN NICHOLL, thus expressed himself in an elaborate judgment, in 1822: "In Ireland, marriages may be had, "without any celebration *in facie ecclesiæ*, or in the pre-"sence of witnesses."—"The general matrimonial law of "Ireland is what that of this country was before the Mar-"riage Act."—"Marriages in England were proveable "by circumstantial evidence, before the Marriage Act." (*Steadman* v. *Powell*, 1 Add. 64, 65.) This was said, too, in a case, where "the issue was purely matrimonial, "though it occurred in a testamentary suit:" and all that the learned Judge found was, that a fact of marriage was proved, and that the individual, who assisted at the celebration, in a sacerdotal character, was *not* proved to be a Popish priest. That he was a minister in Holy Orders of the Church of England, or Ireland, there was not a scintilla of evidence to show: and yet Sir John Nicholl pronounced (in substance) for the marriage; nor has that judgment ever been impeached.

II. Having thus, my Lord, shown, that by the law and practice of the Ecclesiastical Courts of England, from the thirteenth century to the year 1753, a contract of marriage,

*per verba de præsenti* alone, between competent persons, was a marriage *de jure*, I now enter on the second branch of my argument, to show, that this principle was, during the same tract of time, *recognised* as legal by the Common and Statute Law.

The earliest authority, in the Common Law, referred to by Sir N. Tindal, is that of *Bracton*, who wrote about A. D. 1270, and from whom he cites a passage (b. 2, c. 9,) but conceives him not to have been then writing as a Common Lawyer, and to differ from the authority of the Year Books. (Opins. p. 7.) My Lord, I would not presume to controvert the Lord Chief Justice's estimate of a Common Law authority, on any judgment of my own; but Mr. Justice BLACKSTONE, as your Lordship well knows, enumerates Bracton among those authors, "to whom great "veneration and respect were paid by the students of the "Common Law,"—"whose treatises are cited as autho- "rity, and are *evidence* that cases have formerly happened, "in which such and such points were determined, which are "now become settled and first principles." (1 Comm. 72.) The learned SELDEN, too, ranks Bracton with the author of the work called *Fleta*, and others, who "afford to the more "studious investigators of the Common Law, in its origin "and progress, the same aid, as the works would do (if "perfect) of Papirius, Tubero, Papinian, Ulpian, &c. &c. "in the Roman Law."—"Certainly" (says he) "it must be "owned that they are not only ornamental in forensic and "scholastic disputation; but possess that *authority*, on "which the interpretation of law depends." (*Diss. ad Flet.* c. 1.) "Although he had been a Civilian," (says Sir W. JONES), "yet he was also a great Common Lawyer: "and never, I believe, adopted the rules and expressions "of the Romans, except when they coincided with the "laws of England in his time." "He is certainly the best (adds this accomplished Lawyer) "of our judicial classics."

(On Bailments, Works, 8, 404.) At all events, his is the fullest account, that we possess, of the state of the Common Law at the end of Henry the Third's reign, when, as Mr. Hallam observes, " the establishment of a legal system " must be considered as complete," and when " the un- " written usages of the Common Law, as well as the forms " and precedents of the Courts, were digested into the great " work of Bracton." (Mid. Ag. 2, 471.) However, we need not rely on Bracton alone. Let him be compared with the author of Fleta; since the latter wrote shortly after, and often copied the very words of the former, but with additions, which showed that he was no servile follower; so that if Bracton had committed any error, it would doubtless have been corrected by the author of Fleta, who is believed, as well as Bracton, to have been a Common Law Judge, and whose work (as Selden says) " exhibits the ancient face of the English Law, such as it " was under Edward the First."

For these reasons, I am disposed to consider Bracton and Fleta together: and, in the first place, they clearly evince, that the principle, " Judex sæcularis de rebus spiri- " tualibus cognoscere non debet," was received in their time as an incontrovertible maxim. (Fleta, 6, 37.) My Lord, at this day, and in this country, it is not easy to conceive the weight and influence of such a principle on the human mind. Doubtless a judge in the Queen's Courts at present would not wantonly interfere with the spiritual jurisdiction; but if he had inadvertently done so, his conscience would not be alarmed with the terrors of excommunication. History, however, informs us, that in the time of Henry IV. the bold and manly Chief Justice, Gascoigne, who had committed the Prince of Wales to prison for a contempt, and had put down rebellion with an armed hand, refused to sit in judgment on Archbishop Scrope, because he thought it would be violating the immunities of the Church. The

same feeling, my Lord, prevailed not long ago at Malta; and probably prevails there still. In the time of the Knights, within living memory, the Grand Master De Rohan, (a despotic prince), sent for one of the native judges, and commanded him to take certain steps against a priest. The judge refused; alleging, that it would violate the laws of the Church. The Grand Master insisted; but finding the judge firm, dismissed him with the opprobrious epithet *Bestia!* (Blockhead!) The judge withdrew; but was heard to mutter, as he went, "*Meglio bestia, che scomunicato!*" (Better be a blockhead, than excommunicated!)

If the temporal judge could not take cognizance of a spiritual matter, he of course could not take cognizance of the lawfulness or unlawfulness of a marriage; for marriage, being deemed a Sacrament, was highly spiritual. Therefore Bracton says, "The discussion, whether there be ma-" trimony or not, does not belong to the secular judge" (l. 5, c. 19, s. 1); so, FLETA, "The discussion, whether " there was matrimony or not, or which woman was the " lawful wife, and which not, does not belong to the secu-" lar judge" (l. 6, c. 39). When, therefore, such a question arose, it was necessarily referred to the Bishop's Court. " Such cognizance belongs to the Ecclesiastical Judge," says Bracton, (l. 5, c. 19, n. 1); and so it is said nearly in the same words in Fleta (l. 5, c. 28). Bracton explains the proceedings on such a reference. " The duty of the " ordinary will be, that, having called together the parties, " he shall in their presence, if they attend, make diligent " and summary inquiry, according to the form of the writ, " and whether espousals or matrimony have been con-" tracted, or none at all, or if matrimony, but unlawful. " Therefore it will be to be considered concerning the " matrimony beforementioned, who is the lawful heir; and " as it is said that the lawful heir is he whom just nuptials

" show, whether there has been a marriage, public or clan-
" destine, whether contracted by *words of present* or of
" *future time,* or under condition, but *so, that it cannot be*
" *dissolved,* nor has been dissolved in the lifetime of the
" contracting parties" (l. 5, c. 19, s. 12). This dissolution in the lifetime of the parties was by divorce *a vinculo:* and this also (says Fleta) " belongs to the Ecclesiastical Forum, " which certifies it to the king's justices" (l. 5, c. 28).

Questions may have been referred to the Bishop from the King's Courts, in the course of various Common Law suits, touching donations between husband and wife, dower, bastardy, &c.

As to the first class, the rule of the Common Law was, that donations between husband and wife, during matrimony, were invalid; and Bracton, after stating this, adds: " Marriage may be understood, whether it be publicly " contracted, or *faith given so that they cannot be se-*
" *parated.*" (l. 2, c. 9.) Here, again, we see that the distinctive character of marriage, in Bracton's view, was its indissolubility: and it has been repeatedly shown, that faith given *per verba de præsenti* was, by the law of the Church, indissoluble. Such was the law of the Decretals imposed by pontifical authority on all schools and courts, less than forty years before Bracton's work was compiled. Such was the doctrine of the greatest theologians of the age; and Bracton himself cites an adjudged case at the Common Law, which (as I understand it) seems directly in point to his position. He says, " that donations of this kind " are not valid, is proved by a Roll of Michaelmas Term in " the fifteenth year of King Henry (A. D. 1230), for the " county of Lincoln, in eyre, on an assize of Mort d'An-
" cestor, concerning one Helewisa, to whom a certain Eudo " had made a donation, *after he had plighted faith to her,*
" with whom he *afterwards* contracted publicly: and in this " case, the heirs of Helewisa took nothing, on the assize of

" Mort d'Ancestor, by the seisin of the said Helewisa." (l. 2, c. 9.) Here the plighting of faith is expressly distinguished from the subsequent public solemnity, and the donation is said to be made in the interim between the two. If this plighting (which may have been either *per verba de præsenti* alone, or *per verba de futuro, cum copulâ*) had not been deemed a marriage, the donation would have been good, as ante-nuptial; but it was held bad as post-nuptial, and consequently the contract was deemed a marriage, which doubtless must have been by certificate of the Ordinary, since it was a question which " did not belong to the " secular judge."

Questions of dower might arise, where one woman claimed as widow, in the temporal Court, or where two set up adverse claims to that character. In neither case, would that Court take upon itself to determine the right of marriage. " If two women contend together in a claim of dower, and " each is prepared to prove herself the wife of the deceased, " and it is necessary to ascertain which was the lawful wife, " this cannot be done but by the ordinary of the place." (Fleta, l. 5, c. 25.) And again: " If both produce wit- " nesses, they are to be sent to the Court Christian, that it " may there be discussed which was the lawful wife; and " according to the Ordinary's certificate, must judgment be " given." (Ibid. l. 5, c. 30.)

So, in regard to bastardy: the tenant, alleging bastardy in the demandant, was bound to set forth a certain ground of the bastardy; for " if the ground be not set forth," says Bracton, " it will be impossible to say to what jurisdiction " the cognizance belongs." (l. 5, c. 19, s. 1.) The ground might or might not involve a question of the right of marriage. Thus, the right of marriage is involved if the tenant says, " You have no right in the land claimed, because you " are a bastard, inasmuch as your father never espoused " your mother; or inasmuch as the marriage contracted " between your father and mother was unlawful, by reason

" that he had before contracted with one who was living, " when he contracted with your mother." " Such a cog- " nizance belongs to the Ecclesiastical judge, because ma- " trimony is distinctly denied." (Bracton, l. 5, c. 19, s. 1.) And so says Fleta, in nearly the same words. (l. 6, c. 39.) The issue on either of those pleas, therefore, was sent by the temporal judge to the Ordinary for his certificate: and a case is put, which strikingly illustrates the principle on which that certificate must have been given: " If a man " has a lawful concubine, by whom he has a child during " the concubinage, and he afterwards contracts a clandes- " tine marriage with her, and after that has another child " by her, and at length contracts publicly with her, in the " face of the Church; and subsequently has a third child " by her; it may be asked, on the death of the father, " which of these three ought to be preferred, in the succes- " sion to his heritage: and the truth is, that the *second* is " to be deemed the lawful heir, although he is born of a " clandestine marriage, provided that proof can be made " accordingly." (Fleta, l. 5, c. 28.) And to the same effect speaks Bracton. Here we see, that not only does the Ecclesiastical Court prefer the secret precontract to the public solemnization, as a marriage; but the temporal Court recognizes the preference, by awarding to the son of that precontract the inheritance. Nay, it confirms him in it against all the world. For " the effect of this proof of " legitimation is, that when once it is proved, and a judg- " ment given accordingly in the King's Court, he shall be " held legitimate always and against all persons; unless " there have been fraud in the proof itself." (Bracton, l. 5, c. 19, s. 17.)

But the *right* of marriage (as it is expressed), that is, the validity or invalidity of the marriage bond, in contradistinction to marriage *in possession*, was not always involved in discussions of the temporal rights of dower, inheritance, &c.

It is an error to suppose that, because these temporal rights were refused by the temporal Court, therefore that Court held the marriage in question unlawful; or because they were given, therefore it held the marriage lawful. Nay, one and the same marriage might be held lawful and unlawful to different intents. "A marriage may be lawful as to the "succession of the inheritance, and unlawful as to the "action of dower." (Fleta, l. 5, c. 28.) So in the case just cited, of three sons by the same father and mother under different circumstances, "the mother shall not have dower, "in reference to the second offspring, but in reference to "the solemn desponsation which took place after his "birth." (Ibid.) Hence, "in a case of dower, the secular "judge may lawfully inquire whether the woman was en- "dowed at the church door, and whether the espousals "were public or clandestine" (Ibid. l. 6, c. 39); or "whether "he married her *on his death-bed.*" (Ibid. l. 5, c. 28.)

So, in regard to inheritance, "There are several grounds "of bastardy, the cognizance of which is not to be remitted "to the Court Christian;" for instance, "that he was born "before his father espoused his mother;" or "that he was "not begotten by his mother's husband, but by another "man." If these pleas be contested, "the king's justices "may lawfully inquire into the truth by the country." (Fleta, l. 6, c. 39.) And "it does not belong to the eccle- "siastical judge to inquire; because the matrimony is ad- "mitted by both parties." (Bracton, l. 5, c. 19, s. 1.)

Now, if Bracton and the author of Fleta (both, I repeat, Common Law Judges) are sound authorities for the law of England in their day, we have, in these few extracts, a clear view of the then "existing matrimonial law of this "country;" for it appears, that whenever a question arose on the *validity* of a marriage, the King's Courts regarded it as a question of the Canon Law received in this country, and therefore referred it to the Courts in which that law

was administered; acquiesced in their decision, and carried it into effect, even where the Ecclesiastical Court had set aside a marriage solemnized and consummated, in favour of a private contract between the parties. But if the question turned, not on the validity of the marriage, but on a matter of fact, such as a desponsation in the face of the Church, or an endowment at the church door, then it was decided by the verdict of a jury. These verdicts, however, it is manifest, could not affect the "matrimonial law of the "country," because that law was spiritual, and was recognized by the temporal judges as certified to them by the spiritual Courts.

It remains to be seen whether the decisions of the King's Courts, reported in the Year Books and elsewhere, were in accordance with the doctrines of these "judicial classics," Bracton and Fleta.

I begin with the case in Coke Littleton, which appears to have occurred about A. D. 1282, shortly after the publication of Bracton. The judgment of the Ecclesiastical Court had pronounced the contract *per verba de præsenti* a marriage. B., the wife under the contract, brings an action of dower, and is successful in one temporal Court, and unsuccessful in another. What has all this to do with the validity or invalidity of her marriage? The marriage had been declared valid by the judgment of a competent Court; and it was not, and could not be impeached, either in the *Curia Regis et Concilii*, or in the Court where the action of dower was first brought; for both these Courts were incompetent to such an impeachment. "Hujusmodi "inquisitio fieri non potest nec debet in foro sæculari." All that the Curia Regis et Concilii determined was, that A. the husband, not being seised of the lands, at the time of his public marriage, nor afterwards, his wife could not claim dower out of them; because her previous contract was not sufficient to entitle her to that temporal right. But this was no judgment, that the contract was not a marriage.

The law, it seems, so far discountenanced *clandestine* marriages, as not to allow them to entitle the woman to dower. That is all! And of this we have already seen an instance in the case of the three sons. The private contract gave the son born under it a right of inheritance; but it was only the public desponsation which conferred on the mother a right of dower.

The cases of *Foxcroft* and *Del Heith* (said to be precisely the same in their leading facts) come next to be considered. I have already observed, that they prove nothing as to the Ecclesiastical Law or practice. What is to be inferred from them at the Common Law? They both contain this very material fact, that the marriage set up was one contracted *in lecto mortali.* It seems, from Fleta, that this would have been fatal in a case of dower. (l. 5, c. 28.) Is it not probable that it would have been equally so in a case of inheritance? Whatever may have been done in Foxcroft's case, it is clear that in *Del Heith's* the writ did not go to the Ordinary, for the facts were found by the assize. Consequently, they did not relate to a marriage *de jure,* but to a marriage *de facto;* and all that we can infer from the concluding words of the record is, that the Courts of Common Law at that time did not hold a contract by a man, *in lecto mortali,* to be such a marriage *in fact* as would entitle his alleged son to the inheritance. In short, if either judgment was given on a certificate of the Ordinary, my former observations apply to it. If both turned on matters of fact, decided by a jury, they prove nothing as to the rule of the matrimonial law, which could not be ascertained through such a medium.

I cannot pretend to have waded through the whole voluminous collection of the Year Books; but I have noted a few cases, which confirm the law as laid down by Bracton and Fleta; and with your Lordship's permission, I will mention them in the order of time.

A. D. 1309. The bishop's certificate given and enrolled was held conclusive in a case of bastardy, even against a third party. The defendant having pleaded bastardy, the plaintiff replied that in a former case with one C, he had sued out a writ to the bishop, who certified him to be *mulier;* and he specified the roll in which the certificate remained on record, with the judgment thereupon given. The Court held that once mulier on record was always mulier, and amerced the defendant. (Y. B. 3 Edw. II. M. T.)

A. D. 1344. Where "unques accouple en loial matri-" mony" was taken as issue, it went to the bishop, who certified for the marriage. (Y. B. 18 Edw. III. H. T.)

A. D. 1364. It was held, that if bastardy be alleged in one who is party, it shall be sent to the Court Christian, as well in an assize as in another writ. (Y. B. 38 Edw. III. M. T.)

A. D. 1365. It was held, that upon an issue "sa feme ou " nient sa feme," if she be found *feme,* whether properly or improperly, by the law of this Court, the espousals are good *until they are duly dissolved.* (Y. B. 39 Edw. III., No. 32.)

This issue of "feme ou nient sa feme" was an issue of *fact,* and did not put the validity of any marriage in question, but went to a jury, who found according to the evidence of the apparent fact, ex. gr. that the woman had been publicly wedded, or otherwise. A marriage so found might nevertheless have been really null and void by reason of precontract, consanguinity, &c. and a divorce might have been obtainable on any of these grounds; but until such divorce was had, the woman was considered and treated as a wife by the common law. And, it is clear, that the temporal courts held, that for many purposes, the apparent *status* of a wife was sufficient: ex. gr. if a man and woman brought an action of trespass, as husband and wife, and she was denied to

be a wife, the court would not allow an issue " ne unques accouple en loial matrimony," which must have gone to the Bishop; but permitted an issue, " sa feme ou nient sa feme," to go to a jury. This was ruled 7 Hen. IV. (A. D. 1405).

A. D. 1368. Where bastardy was alleged in one that was dead, the Court would not allow the issue to go to the Ordinary, but held it triable *in pais*, (Y. B. 42 Edw. III). The reason was, that if a marriage, in fact, of the parents could be proved, the legality would be presumed, in favour of a person deceased, who could not defend himself.

A. D. 1373. Five kinds of divorce are mentioned, (i. e. divorce *a vinculo matrimonii*,) viz. causâ professionis, *causâ præcontractûs*, causâ consanguinitatis, causâ affinitatis, et causâ frigiditatis: and it is said that after a divorce causâ professionis, the wife shall have her dower; but in the other cases she shall not be endowed, nor shall the heir inherit. (Y. B. 47 Edw. III. 78.) These divorces then were all recognised by the common law, though they could only be decreed by the spiritual authority, which certified them to the King's Courts. On the face of the certificate, it must have appeared, in a case of divorce *causâ præcontractûs*, that a marriage (however solemn) had been declared null and void, by reason of a precontract. If this had been contrary to " the existing matrimonial law of the country," the temporal courts could never have acted upon it, nor indeed have tolerated it; but far from discountenancing the divorce, they enforced it so rigidly, as to deprive both the innocent wife of her dower, and her son of his inheritance.

A. D. 1375. Where a man and woman brought assize of novel disseisin, as husband and wife, and it was pleaded that she was the wife of another man still living; and she replied that if any such marriage took place it was illegal, she having been at the time alleged only three years old,

and never having legally assented to it: it was questioned whether the trial should be by the Bishop or a jury. The case was adjourned; but one of the judges said "the right "of espousals, namely, whether there has been *lawful* "matrimony or not, is always triable by the Bishop," (Y. B. 49 Edw. III. 18). The doubt seems to have been whether in this kind of action proof of a marriage *de facto* was sufficient.

A. D. 1376. Where a woman sued an appeal of the death of her asserted husband, and an issue was tendered on the other side, "ne unques accouple," &c. the Court sent it to the Bishop to certify; and this case was distinguished from a *Cui in vita;* for there the widow demands something in her own right demesne, and it is no answer, on the part of the defendant, to say "ne unques accouple;" because her action lies, if she was wife *de facto* and under his subjection. (Y. B. 50 Edw. III. 15.) And this distinction was stated more generally (A. D. 1428) when it was said, there is a difference between pleading to the *right* of marriage, and pleading to the *possession*. To the right the plea is "ne unques accouple:" to the possession it is "nient sa feme." (Y. B. 7 Hen. VI. 12.)

A. D. 1405. A divorce shall be tried by the Bishop and not by the country. (Y. B. 7 Hen. IV. 23 b.)

A. D. 1430. It was said, "if a man marry his mother, still they are husband and wife till the marriage is dissolved." (Y. B. 9 Hen. VI. T. T. 34.) This is quoted by Rolle, under the head, "Que serront dits Baron and Feme." And it strongly illustrates the distinction between the *lawfulness* of marriage, as to which, the common law courts were bound by the Bishop's certificate; and the possession of the *status* of married persons, which was tried by the country.

A. D. 1440. A divorce, *causâ præcontractûs*, bastardizes the issue. (Y. B. 18 Hen. VI. 34.) This indeed results

from what is said above under the year 1373. But it has been observed (Opins. p. 4), that Mr. Serj. Rolle (who wrote nearly two hundred years afterwards) mentions this point "in the same page" in which he lays it down, that "if a man who hath a wife takes another wife, and has "issue by her, this issue is bastard by both laws (that is "the common law and the ecclesiastical law), for the second "marriage is void:" and that the same case (Y. B. 18 Hen. VI. 34) is cited for both positions. And then it is said, by way of argument, "if the contract alone makes "the marriage,—if it is itself *ipsum matrimonium*, where is "the necessity for a divorce, in the second case, to bas- "tardize the issue, which, it is admitted, is not necessary "in the former case?" I shall endeavour to answer these objections *seriatim*. As to the two points being mentioned "in the same page," this is a mere accident: they are placed under different heads, and noticed *diverso intuitu*. The title "Bastard" is arranged by Rolle under heads distinguished, as in Comyn's Digest, by the letters of the alphabet; thus, D. E. F. relate to the laws determining bastardy; D. includes bastards by the temporal law and not by the spiritual; E. by the spiritual and not the temporal; and F. by both laws. Then a new topic begins with G. "What divorce bastardizes the issue." Now it happened that the two topics treated under F. and G., though totally distinct, were mentioned in a case of the year 1440, on a *scire facias* relative to the execution of a fine, in which the bastardy of an ancestor of one of the parties was alleged; and a long argument took place, in two successive terms, whether an issue should be sent to the Bishop, or to a jury; but nothing was decided, owing to the death of one of the parties; and the report concludes, *Ideò quære legem.*

No conclusive inference, therefore, can be drawn, as to the matrimonial law, from a comparison of these two placita. But taking them to be both correct, what do they amount

to? The first case put is, "that a man who *hath* a wife takes another": and it is said (Opins. p. 4,) that this word "hath" implies an actual (meaning a duly solemnized) marriage. But this is a mere *petitio principii*. A man *hath* a wife, if the only Court competent to determine whether he hath or not, determines that he hath. And that Court (as we have seen) would equally have determined that he had, whether he had been united to her publicly in the church, or privately by taking her as his wife, in words of present time. Then it is said (Opins. p. 4) to be "admitted," that where a man hath a wife and takes another there is no need of a divorce to bastardize the issue; but I see no such admission. Is the admission inferred from the words "the second marriage is void"? Those words are equally applicable to a case, where the first marriage was private, as where it was public. If both marriages were public, possibly the temporal court might have been satisfied with the verdict of a jury on the *fact;* but whether or not such was the practice, I cannot say. If however the first marriage was private, then a divorce was necessary; for though the second was in the opinion of the Canonists a nullity *ab initio*, the temporal judges could not treat it as such, until they had the bishop's certificate. That was the evidence, and the only evidence, of nullity, which they could receive—the only ground, on which they could refuse dower to the mother, and seisin to the child.

I trust, I have said enough, to satisfy your Lordship, that down to the period last mentioned, the Matrimonial Law of this country, as stated by Bracton and Fleta, did not greatly differ (if at all) from the same law, as it is to be collected from the Common Law decisions: and without entering into further detail, I may venture to say, that the Courts continued to be guided by the same principles, till the Reformation.

How far the Canon Law of England was modified by

that great movement of society, I have already shown. Matrimonial causes, however, were declared by parliament still to be spiritual: and it would have been equally unreasonable and unjust, to have required the temporal judges to decide them; few of those learned persons being probably at that time Canonists. The Common Law Courts, therefore, continued, as before, to receive the bishop's certificate or judgment as decisive of the validity or invalidity of a marriage. Thus in the abovementioned case of *Bunting* v. *Lepingwell*, (A. D. 1586,) the Queen's justices became aware that the Ecclesiastical Court had established a marriage of the woman, *per verba de præsenti*, with Bunting, in preference to one duly solemnized with Twede. Did they impeach this decision by prohibition, or otherwise, as illegal? On the contrary, they evinced their respect for it, in the clearest manner, by adjudging Bunting's son to be legitimate, though he must have been a bastard, had Twede's been the lawful marriage. It is said, these judges "must "be supposed to know what was the Common Law." (Opins. p. 5.) To be sure they did. They knew, that the Common Law had no rules, of its own, to determine what was, or was not, a valid marriage *de jure*. They knew that they were bound, by Common and Statute Law, to recognize that marriage as valid, which the competent Ecclesiastical judge certified to be: and they acted accordingly. This case of *Bunting* v. *Lepingwell* is indeed "of great "weight and immediate bearing upon the point in question;" (Opins. p. 5); for it clearly shows, that the judgment of a spiritual court, at a time when the Reformation had long been firmly established, and when marriage was no longer deemed a sacrament, gave the same matrimonial effect to a contract *per verba de præsenti*, as had been given to it three hundred years before: and that the temporal court *recognized* that judgment, as agreeable to "the existing "rule of the matrimonial law of this country."

Again, in 1587, the marriage of Hampden's daughter with John Croke was dissolved by a divorce *causâ præcontractûs*, in the Spiritual Court. Does my Lord Coke, who mentions the case, intimate that there was any thing illegal in thus treating a contract as *ipsum matrimonium?* On the contrary, he notices it as settled law (which, we have seen, it was considered to be in 1373) "that by the divorce "*causâ præcontractûs*, there is a nullity of the (second) "marriage *ab initio*, and the children between them are "mere bastards." (2 Inst. 93.)

And elsewhere he treats the second marriage as merely a marriage *de facto*, and not *de jure*; though under certain circumstances, it entitled a wife to the temporal right of dower. "If a marriage *de facto* be voidable by divorce, in respect "of consanguinity, affinity, *precontract*, or the like, "whereby the marriage might have been dissolved, and "the parties freed *a vinculo matrimonii*; yet if the husband "die before any divorce, then, for that it cannot now be "avoided, this wife *de facto* shall be endowed; for this is "legitimum matrimonium *quoad dotem*." (Co. Litt. 33 a.)

In the same year, 1587, we find that the distinction between marriage in *right* and marriage in *possession* (noticed above, A. D. 1428) was strongly insisted on, in *Leigh* and *Hanmer's* case. (1 Leon. 52.) Hanmer, the father, was bound in a recognizance, that his son should marry the daughter of Robert Leigh: and a formal marriage between them took place, when the boy was only thirteen; but at fourteen (the age of consent) he renounced the girl. The question was, whether this was a breach of the recognizance: and Egerton, the Queen's Solicitor, said, "This is a marriage at Common Law, not in *right*, "but in *possession*," and marriage in possession is sufficient in things personal. Belknap, J., said "The *right* of "espousals is always to be tried by the Bishop; but the

" *possession* of the marriage not:" and judgment was given against the plaintiff, who sued on the recognizance.

So, in *Fletcher* v. *Pynfett* (Cro. Jac. M. T. 3 Jac.), A. D. 1605. The defendant had covenanted to assure a copyhold to plaintiff if he would marry plaintiff's daughter *ritè et legitimè secundum leges Ecclesiasticas*. Plaintiff sued on this covenant, alleging that he had *ritè et legitimè* married the daughter: upon which issue was joined, and a verdict given for the plaintiff; but exception was taken that it ought to be tried by a certificate from the Bishop, and not by a trial *per pais*. But the Court held " that " the marriage only was in issue, and not whether he were " *lawfully* espoused." Or, as Rolle puts it, " the marriage " is the *substance*, and the lawfulness does not come in " question." Either way it is clear, that the Temporal Court disclaimed all authority to determine what was, or was not a *lawful* marriage; and thought, that the covenant, as pleaded, put nothing in issue, but a marriage *de facto*.

A Mr. Perkins, who wrote about this time, is quoted as an authority, to prove that a contract *per verba de præsenti* was not *ipsum matrimonium*. (Opins. p. 4, 5.) If he, as a Common Lawyer, held this opinion, it would go for little, in opposition to Swinburne, who, as an Ecclesiastical Judge, had a very few years before maintained the contrary. But I do not see that Mr. Perkins makes such an assertion. He treats of Dower, Feoffments, and other matters of the Common Law, and in one place he says, " If a man seised of land in fee make a contract of matri- " mony with J. S., and he die before the marriage is " solemnized between them, she shall not have dower." Now, this is nothing more than the case in Fleta, concerning the three sons. There the mother did not acquire a right to dower by the precontract; but yet the precontract was a marriage (though a clandestine one), and conveyed a right of legitimacy to the son born under it. Mr. Perkins,

however, adds, probably as an inference of his own, " for " she never was his wife." But, as he is not treating professedly of matrimony, but of dower, he must in fairness be understood to mean " she never was his wife *quoad dotem*," which expression, in the sense of the Common Law, may perhaps be justified by the preceding authorities.

Again, Mr. Perkins says, " if a contract of marriage be " between a man and a woman, yet one of them may en- " feoff the other, for yet they are not one person in law, " inasmuch as if the woman dieth before the marriage " solemnized betwixt them, the man, unto whom she was " contracted, shall not have the goods of the wife as her " husband ; but the wife thereof may make a will without " the agreement of him unto whom she was contracted."— And further on he adds, " but after the marriage celebrated " between a man and a woman, the man cannot enfeoff his " wife ; for then they are as one person in law." Here are several points laid down, all of which, perhaps, it might not have been quite safe to take on the sole authority of Mr. Perkins. But admitting them to be all correct, they amount to no more, than what Lord Stowell himself had said, namely, " that the Common Law had scruples, in " applying the civil rights of dower, and community of " goods and legitimacy, in the cases of these looser species " of marriage." It seems to be Mr. Perkins's own notion, that the parties are not one person *in law*, until after a solemnization of marriage. What law he alluded to does not appear. If he meant the Spiritual Law, he was clearly wrong ; if the Common Law, his observation was irrelevant to the validity or invalidity of the marriage bond, and could only be applicable to some of its civil consequences.

That even a clandestine marriage was deemed by temporal judges a spiritual act, we find by the case of *Seeles and others* (Cro. Car. T. T. 15 Car. Reg. (A. D. 1639.)) They had inveigled a young man to marry a woman

in the night, and were sentenced by the Court of the Marches to a year's imprisonment; but upon habeas corpus, "it was doubted, whether the Court of the "Marches could meddle with a clandestine marriage, to "punish it, *being a mere spiritual act,*" and the parties were let out on bail. As the character of spirituality is here given to clandestine marriages in general, it would seem to depend not on any accidental circumstance of place, person, time, &c., but on the essential characteristic of matrimony, the present consent.

The case of *Weld* v. *Chamberlaine* (2 Show. 300, A. D. 1682), was as follows:—"On a trial before Pemberton "C. J., on an issue of 'marriage or no marriage,' the evi- "dence appeared to be this, that a man having taken orders "according to the Church of England in former times, and "been ejected in 1663, contracted the parties in these words, "'I, (A. B.) take thee (B. C.) for my espoused, betrothed, "'wedded wife, and will be thy espoused, betrothed, and "'wedded husband, until death;' the parson speaking "these words, the man repeating them after him, and the "woman the like, *mutatis mutandis,* and no ring, according "to the Common Prayer Book; but a cohabitation as man "and wife for ten years afterwards. Pemberton, C. J., "*inclined* to think it a good marriage, there being words "of contract *de præsenti* repeated after a parson in orders; "but upon the importunity of counsel, a *case* was to be "made thereof."

Certainly no strong legal inference is to be drawn from an argument, in which a chief justice *inclines* to one opinion, but reserves a case for the possible prevalence of another. However, it is asked, (Opins. p. 6), why did he not at once decide for the marriage, on the ground of a contract *per verba de præsenti,* if such was the law? The answer is, that he was not sitting in an Ecclesiastical Court, to try the *right* of marriage, but in a Court of Common Law, to

direct a jury in trying a *fact* of marriage. What was said in the year 1365 of the issue "sa feme ou nient sa feme" applies to the issue "marriage or no marriage" in the year 1682: it was an issue of *fact*, or else it would never have found its way into the Common Pleas. The judge was to be guided by precedents in Common Law Courts, and could only direct the jury as other Common Law judges had directed other juries in similar cases. He had nothing to do, on that occasion, with the law or practice of the Ecclesiastical Court; nor would the verdict or judgment, whether conformable to his then inclination or not, have had any effect whatever in confirming or annulling the marriage between the parties. *That* was matter for the spiritual jurisdiction.

*Alleyne et ux.* v. *Grey* (2 Show. 50, (A.D. 1688,)) shows, in another manner, the difference between pleading a marriage *in right* and a marriage *in fact*. This was an action of debt brought by a husband and wife. The defendant denied their marriage, and pleaded "ne unques accouple;" but this plea was not allowed, because it would have altered the course of trial, by sending an issue to the Bishop, instead of the country; and because it admitted a marriage, and only denied its legality; whereas, for the purposes of this action, a marriage *de facto* was sufficient, and whether legal or not was nowise material.

The statute 6 & 7 W. III. c. 6, (A.D. 1695), imposed a duty on marriages; and sect. 63 enacted, that all Quakers and Jews, and any other persons *who should cohabit and live together as man and wife* should pay the duty; and that upon every pretended marriage made by them, they should give five days' notice; and s. 64 enacted, that nothing in the act should be construed to make good or effectual in law any such marriage, or pretended marriage; but that they should be of the same force and virtue, and no other, as if the Act had not been made. From all this

it seems to be inferred (Opins. p. 8), that these marriages, or pretended marriages, were never considered legal. I cannot say, that the Act appears to be very judiciously drawn; or that a duty on all persons, who should cohabit and live together as man and wife, would be perfectly easy in the collection; but if the Act does not give these vaguely described unions any new legal effect, it takes away none that they may have before possessed. A contract *per verba de præsenti*, by whomsoever made, remained "of the same force and virtue and no other, as if the Act had not been made." Lord Hale, it appears, once directed a jury to find a special verdict on a Quaker's marriage (Opins. p. 8), but whatever verdict they might have found, it could neither add to, nor detract from the validity of the marriage *de jure*; for on *that* they had no power to decide. They could only say that it was, or was not, such a marriage *de facto*, as carried with it, in the judgment of the Court, certain temporal consequences.

In the year following the last-mentioned statute, it was found that the provisions for collecting the duties thereby imposed were ineffectual (as might have been expected), and another Act was passed (stat. 7 & 8 W. III. c. 35, (A.D. 1696)), "for the enforcing the laws which restrain "marriages without licence or banns," &c. The 3rd section imposes a penalty of 100*l.* on clergymen permitting other clergymen to marry persons in the *churches or chapels* of the former without banns or licence; and the 4th section imposes a penalty of 10*l.* on every man so married; and it is said (Opins. p. 9), this remedy was defective, if a contract *de præsenti* alone was a marriage; and a similar objection is inferred from stat. 10 Ann. c. 19, s. 176, which imposes a penalty of 100*l.* on any clergyman marrying persons without banns or licence *in any place whatsoever*. It is admitted indeed, "that the inference from these Acts is not very strong;" as indeed it is not; for at the most it

only shows, that in the outset of a new financial system the first statute was imperfect, the second less so, and the third still less, but still some imperfections remained; and every possible evasion of duties was not provided for. This also is to be said, that contracts *de præsenti* were at all times rare; that they exposed the parties to the risk of ecclesiastical proceedings, and were destitute of many civil advantages; and being always matters of secrecy between the parties, it would have been absurd to expect that they would notify them by the payment of a public tax.

I now come to the case, on which so much argument has been built, that of *Jesson* v. *Collins*, (or, as it is elsewhere called, *Collins* v. *Jesset*,) (2 Salk. 437; 1 Mod. 155; Gibs. Codex, 413, 417 (A. D. 1703)). A libel had been given into the Ecclesiastical Court, to dissolve a marriage, by reason of a precontract *per verba de præsenti*; and prohibition was moved for, in the Queen's Bench, on a suggestion that the contract was *per verba de futuro*, sounding in damages recoverable at common law; but it was refused, on the ground that the Spiritual Courts have jurisdiction of matrimonial causes in general; and it was said by Holt, Chief Justice, and agreed to by the whole Bench, "That "if a contract be *per verba de præsenti*, it amounts to an "*actual marriage*, which the very parties themselves can- "not dissolve by release or other mutual agreement; for it "is as much a marriage in the sight of God as if it had "been *in facie Ecclesiæ*." In the Dalrymple judgment, this passage was cited by Lord Stowell, together with the case of *Bunting* v. *Lepingwell*, to prove, not that the Ecclesiastical Courts of this country "enforced the rule, which held an irre- "gular marriage *per verba de præsenti*, not followed by any "consummation, valid, to the full extent of voiding a subse- "quent regular marriage, contracted with another person" (for that he had shown before, from other sources, 2 Hag. E. R. 67); but that "the same doctrine was *recognized* by

" the Temporal Courts as the existing matrimonial law of " this country." (Ib. 68.) How is this answered? Why, first it is said that Lord Holt's observation was " not the very " point of the case before the Court." Granted; it was not, and it could not be; because the effect of a consent *de præsenti* was a question of spiritual law, and the Queen's Bench was not a Spiritual Court; but yet it came as near to the point as it well could; for the question was whether the Ecclesiastical Court was exceeding its jurisdiction, in trying an allegation that a *consent de præsenti* was a marriage, to the extent of voiding a subsequent marriage. Lord Holt's observation, then, was a mere *dictum*, but the dictum of a chief justice " for whose learning and ability all who " have succeeded him have ever felt, and still feel, un- " bounded respect," and with whom, on that point, the whole Bench agreed.

But then comes the question, By what law did Lord Holt and his colleagues mean, that a contract *per verba de præsenti* amounted to an actual marriage? Was it by the common law of the land? " If so," says Sir N. Tindal, " we cannot accede to the opinion." (Opins. p. 7.) This dissent might perhaps be justified, if Lord Holt had been directing a jury on an issue " marriage or no marriage," as in the case of *Weld* v. *Chamberlayne* above noticed. The contract *de præsenti*, under the circumstances, might not be such an act *in pais*, as would authorize a jury to say that a *fact* of marriage was proved; but the Common Law (as I have observed) had no rules, of its own, to determine what was or was not a *valid* marriage. It had but one rule to go by, on such a question, namely, to *recognize* the doctrine of the Spiritual Court.

A suggestion is made, that Lord Holt might have meant to inform his hearers what the Canon Law of Europe, *not received in England*, was. Why, what had he, or any of his hearers, or any of the parties concerned, to do with that

law?—a law which by no possibility could have any influence whatever on the proceedings, either in the Ecclesiastical Court, or in the Queen's Bench. At least, if he had thought proper to travel so far out of the record, he could not, in common sense and common fairness, have spoken in the absolute terms which he has used; or, if he had done so, some one or other of his colleagues must have admonished the hearers that the law mentioned by the Chief Justice was not applicable to the case before them, and merely brought in by way of illustration—though in what manner it could have illustrated any part of the case, if it differed from the law of England, cannot easily be conceived.

It is said, however, (Opins. p. 7,) to be "abundantly clear" from *Wigmore's case*, which occurred in 1705, that Lord Holt must have intended, in 1703, to refer to the Canon Law not received in England; because in *Wigmore's case* he says "by the *Canon* Law, a contract *per verba de* "*præsenti* is a marriage." The case was this: the wife sued in the Spiritual Court for alimony. The husband was an Anabaptist; he had a licence from the bishop to marry, but married by the forms of his own persuasion. A motion was made for prohibition, and on this occasion Lord Holt used the words in question, adding "*This* is a marriage, "and they cannot punish for fornication, but only for not "solemnizing the marriage according to the forms pre-"scribed by law, but not so as to declare the marriage "void." (2 Burn, E. L. 473.) Again, what had the foreign Canon Law to do with this case? Lord Holt does not say that he is speaking of a law irrelevant to the case before the Court. On the contrary, the whole context shows that he has that case, and the law by which it is to be ruled, distinctly in view. "*This* is a marriage," says he, namely, this union of a Sabbatarian man and woman *per verba de præsenti*—"and *they* cannot punish." Who cannot punish

—the judges at Rome or Naples, or the judges in Doctors' Commons, before whom the suit was pending? Surely the latter. Nor was Lord Holt singular in designating the Ecclesiastical Law in use in England by the term "*Canon* Law;" I find my Lord Chief Justice Hardwicke so employing it, in another case of prohibition, three times, in the course of his judgment: speaking of the Ecclesiastical Law used in England before the Canons of 1603, he calls it "the *Canon Law* anciently received"—"the ancient "*Canon Law*"—"the former *Canon Law* received and "allowed." (2 Burn, E. L. 470, 471.) So Sir E. Simpson says, "the *Canon Law* received here." (2 Hag. E. R. 400.) And so Godolphin entitled one of his works on the English Ecclesiastical Law "Repertorium *Canonicum*," and Ayliffe entitles his "Parergon *Juris Canonici* Anglicani."

Upon the whole, then, I think Lord Holt must be taken to have argued, in both cases, thus:—"We are called upon "to prohibit the Ecclesiastical Court from proceeding to "treat a contract *per verba de præsenti* as an actual mar-"riage, to the effect, in one case, of dissolving a subsequent "marriage, and, in the other, of compelling the husband to "aliment his wife. But this we cannot do; because the "Ecclesiastical Court has exclusive jurisdiction in matri-"monial causes, and because it is notorious that the Canon "Law received in this country, and administered in the "Ecclesiastical Courts, holds a contract *per verba de præ-"senti* to be very matrimony." I take this, I say, to have been Lord Holt's meaning; because it is no more than had been recognized in various decided cases by the Temporal Courts, both before and after the Reformation, as agreeable to the matrimonial law of the realm; it accords entirely with Swinburne and the elder authorities; and it was doubtless familiar to the bench and the bar of that day, as we know it to have been in 1660 from Sir R. Payne's case, and in 1732 from *Holt* v. *Ward*.

An Irish statute (19 Geo. II. c. 13, A. D. 1746) declared certain marriages celebrated by Roman Catholic priests to be null and void. Upon this, and some other laws of like purport, it is observed (Opins. p. 10), that they would be a dead letter, if the contract alone made the marriage. Surely the cases are widely different. The contract alone could only be enforced in the Ecclesiastical Court, and even then would not give dower, &c. until solemnization. The marriage by a priest might have been deemed a marriage *de facto* at Common Law. The proof of the former was much more difficult than of the latter. Many persons, who might think their union sanctified by the intervention of a priest, would hesitate to form such an engagement without it. For these and many other reasons, contracts *per verba de præsenti* alone have at all times been rare. Besides, the law of 1746 was probably directed rather against a particular class of priests, than a particular form of marriage. It was part of a penal code, then in its full vigour, against Roman Catholics; and was passed on the smothering embers of a rebellion, in which the priests of that persuasion had become objects of peculiar suspicion and alarm. After all, arguments from the supposed incongruity or inefficacy of particular statutes are so very inconclusive, that they weigh but as a feather in the scale, against the numerous plain and positive proofs of the actual state of the matrimonial law, which I have already adduced, and which might easily be multiplied, to almost any extent.

My Lord, I have shown the recognitions of the ecclesiastical rule by the Temporal Courts, down to the time when that rule was abrogated by the supremacy of parliament. Any subsequent recognitions must be only as of a bygone transaction. They must be furnished at first by memory, and afterwards by research; till that, which was once

matter of common notoriety, sinks into the obscurity of antiquarian investigation.

Still there are several testimonies to the state of the matrimonial law, as it stood before 1753, which come from personages of such eminence in the Common Law, that in justice to the cause which I have undertaken to defend, I cannot pass them without notice.

In the very year in which the Marriage Act was passed, the great commentator on the Laws of England began to deliver the lectures, afterward embodied in the work, which has immortalized his name. He says, "the common law-"yers have borrowed, especially in ancient times, almost all "their notions of the *legitimacy* of marriage from the Canon "and Civil Laws." He calls the act of 1753 "an inno-"vation upon our ancient laws and constitutions;" and he says expressly, "any contract made *per verba de præsenti* "was, before the late act, deemed a *valid* marriage, to "many purposes." (Blackst. Com. b. i. c. 15.) Several editions of his Commentaries were published prior to his death in 1780, but these parts of his text remained unaltered.

In 1788, Lord KENYON became Chief Justice of the King's Bench. In 1795, he thus expressed himself in *Reed* v. *Passer and others* (Peake, N. P. 303)—"I think, "though I do not speak meaning to be bound, that even "an agreement between the parties *per verba de præsenti* "was *ipsum matrimonium*." The occasion did not require him to speak more decisively; but it is remarkable, that he adopts the very phrase of the Canonists; and his authority, so far as it goes, is in recognition of the ecclesiastical rule.

*Lord Ellenborough* succeeded Lord Kenyon in his high station. In a settlement case, in 1808, he held a marriage between two British subjects at Saint Domingo, in a chapel, by the intervention of a person apparently a priest, to be good. In giving judgment, he said, "It is to be seen,

" whether this would have been a good marriage here " before the Marriage Act. Now certainly a contract of " marriage *per verba de præsenti* would have bound the " parties before that act." (*Rex* v. *Brampton*, 10 East, 288.) So able a judge would hardly have expressed this opinion in terms so general, had he meant it to be limited to the particular circumstances of the case before him.

In 1816, Lord Chief Justice GIBBS, after adverting in terms of just respect to Lord Stowell's judgment in the case of Dalrymple, acquiesced in the opinion, that before the Marriage Act marriages in this country were always governed by the Canon Law; and that a contract of marriage entered into *per verba de præsenti* was considered to be an actual marriage. (*Lautour* v. *Teesdale*, 8 Taunt. 836.) This was on a verdict affirming a marriage at Madras, subject to the opinion of the Court: and Lord Wynford, who was counsel against the marriage, did not dispute the doctrines above stated, but merely contended, that the local law of Madras required a marriage licence, which had not been obtained. Both he, therefore, and Lord Chief Justice Gibbs, may be taken to have assented to these doctrines, which they certainly would not have done out of blind submission to Lord Stowell's judicial character, however high it may have stood in their estimation.

My Lord, with all the unfeigned respect, which I bear to my Lord Chief Justice Tindal, I cannot bring myself to think with him, that the opinions of those other three eminent chief justices, my Lords Kenyon, and Ellenborough, and Sir Vicary Gibbs, delivered, as they were, from the bench, at distant intervals, and without the least connexion in the cases or circumstances at issue, were all erroneous, and all founded on an erroneous dictum of Lord Chief Justice Holt. Nay, that *all* the subsequent opinions expressed by different judges, to the same effect, had their origin in that one particular dictum! As I have shown, that my

Lord Holt himself was fully borne out in what he said, not only by the whole tenor of the English Canon Law, but by authorities beginning with the earliest known history of the Common Law; so I think it is not too much to suppose, that many, if not all succeeding judges, who expressed similar opinions, had derived their knowledge, in like manner, from ancient sources.

My Lord, I shall mention but one more recent authority, in relation to the English Matrimonial Law, independently of the act of 1753; but it is an authority which, in my view of it, carries great weight, and goes strongly to confirm Lord Stowell's doctrine. In the year 1818, a very grave question arose, on the validity of marriages, between British subjects, celebrated in India, by ministers of the Church of Scotland; and it was referred to the law officers of the crown, together with other eminent common lawyers and civilians, who unanimously held, that such marriages were governed by the law of England, independently of the Marriage Act of 1753; that they were not to all purposes legal marriages; but that they were *binding upon the parties*, so that *a subsequent marriage by either during the life of the other, with a third person, would be void.* They went on to say, that such marriages, in Courts of Common Law, would be considered as marriages *de facto;* and to point out some legal consequences which would follow from that view of the subject, some that would not, and some which were doubtful; and finally they advised the passing of an act of parliament to meet the difficulties of the case. The names attached to this important document were those of Sir Christopher Robinson, afterwards Judge of the Admiralry; Sir S. Shepherd, afterwards Chief Baron of the Exchequer in Scotland; Sir R. Gifford, afterwards a Peer and Master of the Rolls; Mr. Serjeant Lens, Mr. Cooke, Mr. Bosanquet, late a Justice

of the Common Pleas; Dr. SWABEY, and Dr. LUSHINGTON, now Judge of the Admiralty.

When these eight learned persons say, that by the *Law of England*, apart from the Act of 1753, the marriages in question were so binding upon the parties, that a subsequent marriage by either, during the life of the other, with a third person, would be void, they assert a principle of the *Canon Law of England;* and they state two essential characteristics of *ipsum matrimonium* according to that law; namely, that the obligation endures, from the moment that it is contracted, till the death of one of the parties; and that so long as it lasts, it totally incapacitates both parties from contracting the like union with any other person. This, my Lord, is marriage *de jure*, according to the matrimonial Law of England, administered in the Ecclesiastical Courts, and recognised in the Courts of Common Law. Now, how is such a marriage constituted in the case before us? By a man and woman taking each other as husband and wife, in words of present time, in the presence of a Presbyterian minister. But this minister, not having received episcopal ordination, would have been considered by the Law of England, in 1753, to be a mere layman. (Opins. p. 14.) It remains, therefore, that this marriage *de jure* must, in the opinion of the eight eminent lawyers above named, have been constituted by the present consent of the parties, expressed in words, and by nothing else. It is true, that they tell us, that the Courts of Common Law would have treated them as marriages *de facto*, and in that character would have allowed them to carry certain legal consequences, and not to carry others. But this is only a further confirmation of Lord Stowell, who says "that the Common Law had scruples, in applying the "civil rights of dower, &c. to these looser species of mar-"riage." (2 Hag. E. R. 68.)

The statute (58 Geo. III. c. 84, A. D. 1818) passed in consequence of this opinion, recited that doubts had arisen concerning the validity of such marriages, and then declared and enacted that those solemnized before 31st December, 1818, should be, and should be adjudged, esteemed, and taken to have been, and to be, of the same and no other force and effect, as if such marriages had been had and solemnized by clergymen of the Church of England according to the rites and ceremonies of the Church; thus giving to marriages *per verba de præsenti* the legal benefits of solemnization, as had been done by the Act of Charles II., and for similar reasons of sound policy and natural justice.

My Lord, I trust, I have proved, to your Lordship's satisfaction, by historical evidence, that from the thirteenth century, when the English Canon Law and the English Common Law first took a systematic form, down to the time of the Reformation, contracts of marriage, *per verba de præsenti* alone, between competent persons, were held by the Ecclesiastical Courts to constitute the sacrament of marriage, and therefore to be marriages *de jure;* and that such marriages duly certified to the Common Law Courts were recognised by them as legal; and again, that from the time of the Reformation to the year 1753, though marriage was no longer held to be a sacrament, it was still held to be of Ecclesiastical jurisdiction, was still held by the Ecclesiastical Courts to be constituded *de jure* by a like consent *de præsenti,* and when certified as such to the Common Law Courts, was still recognised by them as legal. If I have proved this, I have justified the two principal positions, which have been questioned, in Lord Stowell's judgment.

III. But to prevent misapprehension of some parts of my argument, I feel it necessary to enter a little more particularly into the distinction, to which I have before adverted, between marriage *de jure* and marriage *de facto.*

Previously to 1753, (with the sole exception of the cases under stat. 12 Car. II. c. 33,) marriage *de jure* could only be determined by the Ecclesiastical Courts; whilst the Common Law Courts, for various purposes, were satisfied with a *primâ facie* case of marriage: they took certain facts as proofs presumptive of marriage. They did not, and could not, determine, that marriages so proved were valid or complete, or that marriages not so proved were to all intents and purposes null and void. On the contrary, their judgment was liable to defeasance by a matrimonial suit in the Spiritual Court. On the other hand, they did not take a mere consent *de præsenti*, unattended with certain circumstances *in pais*, as sufficient proof of a marriage *de facto*. But why? Because the rules and principles applicable to such consents were *alieni fori;* and if the party did not resort to the proper forum, in due time, *sibi imputet*. Still this did not prevent the Common Law Courts from *recognising* the same consent *de præsenti* as a lawful marriage, when shown so to be, by the certificate, or recorded judgment, of the Ecclesiastical Judge.

I do not know, that any rule can be safely laid down, for determining what constituted a marriage *de facto*, in the contemplation of the Courts of Common Law. Certainly there must have been an *animus nubendi*, and some overt acts evidencing that *animus*, with some degree of publicity. It manifestly was not always thought necessary, that the ceremony should take place in a Church, or with the use of a ring, or with the ritual words of the English marriage service, or with the presence and intervention of a Minister in Holy Orders of the Church of England. In *Weld* v. *Chamberlayne*, the marriage was by an ejected minister, without a ring; in *Fielding's* case (which I shall presently mention) by a Romish priest in a private lodging; in the marriages of *Quakers*, without any Minister intervening; and in the *Indian* marriages, with the pre-

sence and prayers of a Presbyterian Minister. I say nothing of *Jewish* marriages; for the Hebrew nation, in all our Courts, were long treated as a peculiar and separate people.

In all the cases above noticed of marriages tried by a jury, previous to 1753, it is clear, that the *fact* of marriage alone was in issue, and not whether the parties were legally married. I speak of those cited under the dates of 1365, 1368, 1376, 1430, 1587, 1605, 1682, and 1688; and the same remark applies to those, which I am about to mention.

The statute (1 Jac. I. c. 11), made it felony for any person, "being *married*," to "*marry*" another. Lord Coke, writing shortly after this enactment, says, "this extendeth "to a marriage *de facto*, or voidable by reason of a pre-"contract, or of consanguinity, affinity, or the like; for it "is a marriage, in judgment of law, until it be avoided: "and therefore, though *neither* marriage be *de jure*, yet "they are within this statute." (3 Co. Inst. 88.) The words "until it be avoided," are rendered necessary by the proviso in the act, (s. 3), that nothing therein contained shall extend to any person, where the former marriage "shall be declared void by sentence in the Ecclesiastical "Court." Agreeably to Coke's doctrine, the following case may be put: a person who had married A. by a private contract, and then (living A.) married B. by a public solemnization, and afterwards (living A. and B.) married in like manner C., might have been indicted for bigamy in marrying C., and must have been convicted, on proof of the marriage with B. Hence, some argue, that the second marriage was not a nullity, which it would have been (say they) if the contract with A. had been a marriage. But this is only another instance of the errors, which arise from confounding marriage *de jure* with marriage *de facto*. The first of these supposed marriages would have been, in

Coke's time, a marriage *de jure*, and might have been so declared by the Ecclesiastical Court; but until such declaration, (unless it were attended with circumstances *in pais*, of which the jury could take notice), the Common Law Court would probably have treated it as a nullity, *quoad factum*. The second and third marriage, on the contrary, would have been nullities *de jure*, and might have been so declared by the Ecclesiastical Court; but until such declaration (explicit or implicit), inasmuch as they must have been attended with circumstances *in pais*, which the jury were bound to notice, the Common Law Court must have treated the second as a marriage *de facto*, and the third as a nullity, *quoad factum*.

The case of *The Queen* v. *Fielding*, 14 State Trials, 1327 (A. D. 1705), illustrates the distinction between a marriage *de jure* and a marriage *de facto*, by an actual decision on the point of bigamy. The first marriage was at a private house in England, by the intervention of a Roman Catholic priest, and upon evidence, that under those circumstances the prisoner, in answer to the question, whether he would have the woman for his wedded wife, said that he would; and that the woman answered affirmatively to the question put to her, whether she would have Mr. Fielding for her husband, the jury found him guilty of bigamy. It is observed that the judge "in "summing up the case to the jury, more than once adverts "to the fact, that the marriage was by a priest;" and thence it is inferred that if the contract *per verba de præsenti* had been merely in the presence of a layman, the judge would not have held the offence of bigamy to have been committed. (Opins. p. 6.) I feel a difficulty in coming to that conclusion. I do not know what Mr. Justice Powell would have said, in directing the jury on other facts, than those which were actually before him. But this is clear, that if he was guided by Lord Coke's exposition

of the statute, on which the prisoner was tried, it was sufficient for him to direct them to find the first a marriage *de facto*, whether it was a marriage *de jure* or not, and he might very possibly think, that a marriage *de facto* was better proved by the presence and intervention of a person acting in a sacerdotal character (to whatsoever communion he might belong) than of a mere private individual; for the *animus nubendi* is an essential part of the *fact* of marriage; and that *animus* may well be thought to be more clearly shown, when the parties desire the intervention of a minister of religion, than when they do not.

Two cases of bigamy, tending further to illustrate the distinction between marriage *de jure* and marriage *de facto*, have occurred within my own experience; those of *Cooke* v. *Browning* (Arches, A. D. 1812), which, I believe, is not reported; and *Bruce* v. *Burke*, (Arches, A. D. 1825), reported by my learned friend Dr. Addams, (2 Add. 471).

In the first case, Cooke, the man, married, by licence, Browning, a minor, without the consent of her father. After living with her some time, he consulted a gentleman of the common law bar, who advised that the marriage was null, by stat. 26 Geo. II. c. 33. Hereupon Cooke married another woman, and was in consequence tried for bigamy. In his defence, he produced the legal opinion, which he had taken; but the jury (rightly considering that document as no proof for or against the *fact* of marriage) found him guilty. He subsequently, under my advice, brought a suit in the Ecclesiastical Court, for the nullity of the first marriage, and having obtained a declaratory sentence to that effect, applied to the crown for a pardon, which was immediately granted.

In the second case, Burke, the man, was married in Ireland to Mary Butler, a Roman Catholic, by the Romish rites, and by a Romish priest, which was lawful, by the Irish statute (19 Geo. II. c. 13), if Burke was a Papist,

otherwise not. Afterwards, in her lifetime, he was married, in England, by the rites of the English Church, to Mary Ann Bruce, a Protestant. He also was tried for bigamy; and in his defence said, that he had always been a Protestant, and consequently that his first marriage was null, by the statute just mentioned. The jury, however, disbelieving him, found him guilty; whereupon the second wife instituted a suit in the Ecclesiastical Court for the nullity of her marriage, and succeeded, on clear proof, that he was a Catholic at the time of his first marriage. Sir John Nicholl, in his judgment, observed, that if the alleged invalidity of the first marriage had been proved on the trial for bigamy the prisoner "would most unquestionably have been acquitted;" and "that in spite of "the conviction, it was still open to him to plead and "prove (if he could), in the Ecclesiastical Court, the "same invalidity, in bar of the second wife's suit," (2 Add. 480).

Your Lordship will not fail to observe the difference between the nullities suggested in the two last mentioned cases, and those mentioned in the two preceding. They are all nullities *de jure*; but in the earlier cases, they were only cognizable in the Spiritual Court: in the later they were equally cognizable in the Temporal Court. When it is said, in the case supposed from Coke's statement, that the second marriage is null *ratione præcontractûs*, a cause of nullity *de jure* is suggested, into which the Common Law Court, for the trial of bigamy, could not inquire, and had no need to inquire, if (as Coke holds) a marriage *de facto* be within the statute. Again, in Fielding's case, when the prisoner alleges that his first marriage is null, as a mere contract entered into without the presence of a minister of the Church of England, he suggests a cause of nullity *de jure*, determinable only in the Ecclesiastical Court; but though the Temporal Court could not inquire into this, it

might well have determined (as it actually did) that the circumstances, in evidence before it, afforded sufficient proof of a marriage *de facto*.

On the other hand, the nullities suggested in the two more recent cases, were violations of the Statutes 26 Geo. II. c. 33 (English) and 19 Geo. II. c. 13 (Irish), which being matters *in pais*, were as fully within the cognizance of the temporal, as of the spiritual judicatories.

Although I have referred to Lord Coke's doctrine, on the adequacy of a marriage *de facto*, to support a trial for bigamy, and although this seems to be borne out by some of the best and latest authorities, yet your Lordship will not understand me as offering any opinion on its correctness, whether applied to the Statute of James, or to more recent Statutes, *in pari materiâ*. I hesitate the more, on this subject; because it appears to me, that the eight learned persons, who signed the Opinion on Indian Marriages, in 1818, were not fully satisfied of the soundness of Coke's position. The Indian marriages (like the Irish ones) included a consent *de præsenti*, and the presence and intervention of a Presbyterian Minister; and it was said, that they would be considered, in Courts of Common Law, as marriages *de facto*; and yet the very eminent lawyers who advised on them, "*doubted* whether, in case of a second "marriage, an indictment for bigamy could be maintained." Why this doubt, if Coke's doctrine be right in principle? And if it be not, then what is the sound doctrine? The words are, "if any person being *married* shall *marry*." And it is argued, that "married" and "marry," "must of "necessity point at and denote marriage of the same *kind* "and obligation." (Opins. p. 14.) But Lord Coke does not seem to have thought so. He says "this *extendeth* to "a marriage *de facto*," evidently implying that it might include marriages *de jure*, though they were such as the Common Law Courts could not hold *primâ facie* to be

marriages *de facto*. Now, put the case, that (A.) a Presbyterian man in India, before the Act of 1753, had been married *per verba de præsenti*, in the Presbyterian form, and in presence of a Presbyterian minister, to (B.) a Presbyterian woman, and had afterwards come to England, where he was unknown, and had there been married to (C.) a member of the Church of England, by the rites of the Church of England; and had had issue by her, and that (B.) had sued him on the contract *de præsenti* as a marriage, and recovered him as husband, by sentence of the Ordinary, and that the same sentence had declared the marriage with (C.) null *ratione præcontractús*, by means of which C. had lost her dower, and her children had become illegitimate (for all which, precedents have been already shown,) could it not be said of (A.), in the words of the Statute of James, that he, being *married* to (B.) had *married* (C.)? And would he not, in such a case, have fallen under the description given in the preamble, "of evil disposed persons, who, "being *married*, run out of one county into another, or into "places where they are not known, and there become to be "*married*, having another wife living?" These, my Lord, are points, which I leave wholly to your Lordship's more practised judgment. They lie at some distance from my former professional pursuits, and they are not necessarily involved in those doctrines of Lord Stowell's, which I have humbly undertaken to defend.

Here, then, I close an investigation, which, I cannot but feel, must have proved a heavy burthen on your Lordship's attention. But if I have travelled over a long space of legal history, and have entered into a minuteness of detail, which may appear tedious, it was because I could not otherwise encounter (with any chance of success) the great weight of learning, which the Lord Chief Justice of the Common Pleas has adduced, in support of his doctrines. And if, after all, I have erred, in my opinion of the matrimonial

effect of a contract *per verba de præsenti*, I have, at least, had the satisfaction of showing that my error has been countenanced by the great names of Bracton, the author of Fleta, De Burgo, Lyndewood, Swinburne, Lord Chief Justice Holt, Ayliffe, Oughton, Sir E. Simpson, Mr. Justice Blackstone, Sir G. Hay, Lord Chief Justice Kenyon, Lord Chief Justice Ellenborough, Lord Chief Justice Gibbs, and, above all, of the ablest Ecclesiastical Lawyer of his age, Lord Stowell.

I am, my dear Lord,
Your Lordship's
Old and sincere friend,
And very faithful Servant,
JOHN STODDART.

BROMPTON, 21st November, 1843.

N. B.—Since writing the above, the Author has had the gratification of perusing Lord Brougham's admirable Speech, in the House of Lords, on the cases in question. Had he enjoyed that advantage earlier, he would have spared himself the trouble of endeavouring to establish by argument several points, which the powerful reasoning of the Noble and Learned Peer had already placed beyond dispute. Above all, he would have thought it superfluous to dwell on the inconceivable error, which his Lordship has so ably exposed, of treating as a mere *obiter dictum*, that part of Lord Stowell's judgment, which was, in truth, the very key-stone of the fabric.

# APPENDIX.

## No. I.

p. 1. **OPINIONS of the Judges on the Questions of Law propounded to them in the Case of The Queen *v.* Millis (Wr. Err.), and in the Case of The Queen *v.* Carroll (Wr. Err.).**

*Die Veneris, 7° Julii* 1843.

Lord Chief Justice Tindal.

My Lords, the first question which your Lordships have proposed to her Majesty's judges is the following —" A. and B. entered into a present contract " of marriage *per verba de præsenti* in Ireland, in the house and in the presence " of a placed and regular minister of the congregation of Protestant Dissenters " called Presbyterians; A. was a member of the Established Church of England " and Ireland; B. was not a Roman Catholic, but either a member of the Es- " tablished Church or a Protestant Dissenter; a religious ceremony of marriage " was performed on the occasion by the said minister between the parties " according to the usual form of the Presbyterian Church in Ireland; A. and " B., after the said contract and ceremony, cohabited and lived together for two " years as man and wife; A. afterwards, and while B. was living, married C. " in England;—did A. by the marriage in England commit the crime of " bigamy?"

In order that your Lordships should apprehend clearly the grounds of our answer to this question, we think it will be convenient to consider, in the first instance, separately, the general and abstract question, What was the nature and obligatory force of a contract of marriage *per verba de præsenti* by the English Common Law, previous to the passing of the Marriage Act, 26 Geo. II.? and that we should then consider the same question with reference to the particular conditions and circumstances with which it has been submitted for our opinion.

My Lords, the abstract question we propose first to consider is one involved in much obscurity; and if Serjeant Maynard, the most learned lawyer of his day, was compelled to state, in a debate on the commitment of the Marriage Bill passed by the parliament in the time of the Commonwealth (see 2d Vol. Burton's Diary, 337), " that the law lies very loose as to things that are natu- " rally essential to marriages, as to pre-contracts and dissolving marriages;" and if Lord Chief Justice Holt and other eminent judges have since been found to express themselves with considerable uncertainty upon the same subject; it may well become us, the judges of England of the present day, when for nearly a century the whole doctrine relating to contracts of marriage, as contradistinguished from marriage itself, has become nearly a dead letter in our Courts, to confess the subject is involved in still deeper obscurity than in the time of our predecessors, and to acknowledge ourselves unable to trace out and define the boundary between the contract and marriage itself with absolute certainty. Indeed the learning and ingenuity which have been brought to bear on the subject, as well by the judges of her Majesty's Court of Queen's Bench in Ire-

land, amongst whom a difference of opinion has prevailed, as by the counsel at your Lordships bar, upon the argument of this case, is a proof that arguments of great weight, and authorities of which it is impossible to deny the application to the subject matter of controversy, may be advanced on either side of this disputed proposition.

In this state of the question it is only after considerable fluctuation and doubt in the minds of some of my brethren that they have acceded to the opinion which was formed by the majority of the judges upon hearing the argument at your Lordships bar, and that I am now authorized to offer to your Lordships as our unanimous opinion, that by the Law of England, as it existed at the time of the passing of the Marriage Act, a contract of marriage *per verba de præsenti* was a contract indissoluble between the parties themselves, affording to either of the contracting parties, by application to the Spiritual Court, the power of compelling the solemnization of an actual marriage; but that such contract never constituted a full and complete marriage in itself, unless made in the presence and with the intervention of a minister in holy orders. p. 2.

It will appear, no doubt, upon referring to the different authorities, that at various periods of our history there have been decisions as to the nature and description of the religious solemnities necessary for the completion of a perfect marriage which cannot be reconciled together; but there will be found no authority to contravene the general position, that at all times, by the Common Law of England, it was essential to the constitution of a full and complete marriage, that there must be *some* religious solemnity; that both modes of obligation should exist together, the civil and the religious; that, besides the civil contract, that is, the contract *per verba de præsenti*, which has always remained the same, there has at all times been also a religious ceremony, which has not always remained the same, but has varied from time to time, according to the variation of the laws of the Church; with respect to which ceremony it is to be observed, that whatever at any time has been held by the law of the Church to be a sufficient religious ceremony of marriage, the same has at all times satisfied the Common Law of England in that respect. If, for example, in early times, as appears to have been the case, from the Saxon laws cited in the course of the argument, the presence of a mass priest was required by the Church; and if, at another time, the celebration in a Church, and with previous publication of banns, has been declared necessary by the Ecclesiatical Law; and, lastly, if since the time of the Reformation, the Church held a deacon competent to officiate at a regular marriage ceremony; with each of these modes of solemnization the Courts of Common Law have given themselves no concern, but have altogether acquiesced therein, leaving such matters to the sole jurisdiction of the Spiritual Court. So that, where the Church has held, as it often has done, down to the time of passing the Marriage Act, that a marriage celebrated by a minister in holy orders, but not in a Church, or by such minister in a Church, but without publication of banns and without licence, to be irregular, and to render the parties liable to ecclesiastical censures, but sufficient, nevertheless, to constitute the religious part of the obligation, and that the marriage was valid, notwithstanding such irregularity, the law of the land has followed the Spiritual Court in that respect, and held such marriage to be valid. But it will not be found (which is the main consideration to be attended to), in any period of our history, either that the Church of England has held the religious celebration sufficient to constitute a valid marriage, unless it was performed in the presence of an ordained minister, nor that the Common Law has held a marriage complete without such celebration.

My Lords, in endeavouring to show the grounds upon which we hold that such is the Common Law of this realm, I shall first consider the decisions which have taken place in our Courts of Common Law, as to which, it is scarcely

necessary to say, that decisions of the Courts of Common Law are at once the best expositors and the surest evidence of the Common Law itself. I shall next advert to certain statutes passed by the legislature at various periods, tending to throw light upon the obscure subject now under discussion, and which appear to confirm the opinion which we have formed; and, lastly, shall call attention to the doctrine of the king's Ecclesiastical Law, as established and administered in this country, by which alone, and not by the general Canon Law of Europe, still less by the civil, are the marriages of the Queen's subjects regulated and governed.

And with respect to the decisions of the Courts of Law and the other Common Law authorities, if no case can be referred to directly or distinctly laying
p. 3. it down as law, in so many words, that a contract *per verba de præsenti* alone, and without the intervention of a minister in orders, is not sufficient to create a valid and complete marriage, yet such conclusion is necessary from many of the decided cases, and is inconsistent with none, nor in fact could the difficulty to be determined in any of the cases ever have existed, except upon the supposition that some religious ceremony was necessary to the contract, thus leading to the conclusion above laid down, that by the Law of England the contract *per verba de præsenti* alone did not constitute a full and complete marriage.

And in referring to these authorities, I do not propose to take up each in succession which has been brought in review before your Lordships; it will be sufficient to support the conclusion above stated to call attention to those which are the most important, and more especially to those of earlier date, as deserving the greater weight.

The earliest case referred to in the argument is the note from Lord Hale's Manuscripts, to be found in Coke, Littleton, 33 a, n. 10; that case is, that A. contracts *per verba de præsenti* with B., and has issue by her, and afterwards marries C. *in facie Ecclesiæ;* B. recovers A. for her husband by sentence of the ordinary, and for not performing the sentence he is excommunicated, and afterwards enfeoffs D., and then marries B. *in facie Ecclesiæ*, and dies. B. brings dower against D., and recovers, because the feoffment was *per fraudem mediate* between the sentence and the solemn marriage, " sed reversatur coram rege et " concilio, quia prædictus A. non fuit seisitus," during the espousals between him and B. *Nota.* " Neither the contract nor the sentence was a marriage."

My Lords, the *Curia Regis et Concilii*, before which the reversal took place, appears, according to the researches of antiquarians, to have been in the time of Edward the First a tribunal of appeal in cases of difficulty, and to have consisted at that time of the Chancellor, the Treasurer, and Barons of the Exchequer, the Judges of either Bench, and other functionaries, which Court of the *Concilium Regis* was perfectly distinct from the *Commune Concilium Regni*, the probable original of the English Parliament.

Lord Hale speaks largely of this Court in his Treatise on the Jurisdiction of the House of Lords, and various references to and extracts from its proceedings are to be found in the learned Introduction to the Rotuli Literarum Clausarum, lately published by the Record Commissioners. The judgment, therefore, of such a Court of Error is of the highest weight. Lord Hale's observation on the case is, " that the sentence was not a marriage;" in making which observation he is probably alluding to a question which, about the time he was making his collection of notes, was a matter of contest at Westminster Hall; viz., whether the man and woman were not complete husband and wife by the sentence of the Spiritual Court, without any other solemnity; as it appears in *Payne's case*, 1 Siderfin, 13, in the year 1660, that Mr. Attorney General Noy had affirmed such to be the law, whilst Twisden, Justice, denied it, saying that the marriage must be solemnized before they were complete husband and wife.

The result, however, of the case above referred to is, that in the judgment of

the Court of Error there was no complete marriage until after the actual solemnization of the marriage under the sentence of the Court: and upon the ground that the husband enffeoffed D. before such solemnization there was no seisin in him during the marriage, and therefore no dower. But the object at present is, to learn from the case whether, in the opinion of the Court, the contract *per verba de præsenti* did alone constitute a marriage; and both from the judgment of the Court below and of the Court of Error the conclusion appears inevitable, that each Court thought such contract alone did not constitute marriage; for the case sets out with stating, that "A. contracts with B. *per verba de præsenti;*" and if this contract had alone constituted marriage then was there seisin in the husband during the marriage and before the feoffment to D., and the reason given by each of the Courts for their respective judgments would have failed. Observe, also, the difference of language employed in the statement of the facts of the case; the contract *per verba de præsenti;* the subsequent statement that A. married B.; the contract; and the subsequent reason by the Court of Error, that there was no seisin during the espousals. Can the expressions of contract on the one hand, and of marriage and espousals on the other, possibly be considered as synonymous, and referring to the same obligation? And this agrees expressly with Hale's inference from the case, "that the *contract* is not a *marriage.*" p. 4.

*Foxcroft's case*, 1 Rolle's Abridgment, 359, which appears to have been in the same year, is next in order. "R. being infirm, and in his bed, was married to "A., by the Bishop of London, privately, in no church or chapel, nor with the "celebration of any mass, the said A. being then pregnant by the said R., and "afterwards, within twelve weeks after the marriage, the said A. is delivered of "a son, and adjudged a bastard, and so the land escheated to the lord by the "death of R. without heir." Now it is to be observed that this case must have been decided upon the usual plea of bastardy in a real action; the writ must have been sent in the usual form by the Court of Law to the ordinary; the certificate also returned by him in the usual form. Bracton, in book 5, chap. 19, gives various instances of the proceedings in cases of bastardy with the greatest possible minuteness, and amongst others, that in s. 11 probably would be the form applicable to this particular case; viz. "an pater suus desponsavit matrem "suam;" and it could not have been until after the certificate of the ordinary, affirming or denying the marriage, that the judgment of the Court could be given. Let it be conceded that the ordinary certified in this instance the marriage to be void, which according to the Ecclesiastieal Law, as then in force in England, he ought to have found good, but irregular only, and exposing the parties to ecclesiastical censures, and let it be further conceded that the Court of Common Law acted upon such finding, and gave judgment against the demandant, as indeed it could not do otherwise, still the weight of this authority on the question before us remains the same. Was a contract *per verba de præsenti*, without any thing more, held at that time to be a complete marriage? is the question. If it was, the ordinary must have returned that R. had married A.; for no doubt has been or can be raised, that when the Bishop of London married the two parties, as stated in the case, he married them *per verba de præsenti*. If, therefore, the contract *per verba de præsenti* had by the Law of England then made a marriage, the parties were actually married; but if the ordinary finds the marriage bad, even where the ceremony was performed by a bishop, because celebrated in an improper place, the inference appears irresistible, that some religious ceremony was necessary, and that words of present contract alone did not at that time, by the Law of England, constitute a marriage.

*Del Heith's case*, 34 Edward I. is precisely the same in its leading facts, and in the conclusion at which the Court of Common Law arrives, that a contract *per verba de præsenti*, even before the parish priest, was not sufficient; but the

concluding words of the record are too strong to be passed over in silence:— "Quæsitum fuit si aliqua sponsalia in facie ecclesiæ inter eos celebrata fuerunt "postquam prædictus Johannes convaluit de prædicta infirmitate. Dicunt "quod non. Et quia convictum est per assisam istam quod prædictus Johannes "Del Heith nunquam desponsavit prædictam Katherinam in facie ecclesiæ per "quod sequitur quod prædictus W. filius Johannis nihil juris clamare potest in "prædictis tenementis sed misericordia pro falso clamore."

The conclusion to be drawn from the comparison of two cases to be found in 1 Rolle's Abridgment, 360, leads to the same inference, that the contract *per verba de præsenti* was not a complete marriage in the time of Henry VI. The first is at F. Placitum 1. "A man who hath a wife takes another wife, and "hath issue by her, this issue is bastard by both laws, (that is the Common "Law and the Ecclesiastical Law,) for the second marriage is void." On the same page he lays it down, in G. Placitum 1, a divorce *causâ præcontractus* bastardizes the issue; the same case in the Year Book, 18 Hen. VI. 34, being cited for both positions. But if the contract alone makes the marriage,—if it is in itself *ipsum matrimonium*,—where is the necessity for a divorce in the second case to bastardize the issue, which it is admitted is not necessary in the former case? They cannot be reconciled together, except upon the supposition that "having a wife" and "taking a wife," that is, "actual marriage," was at that time held to be one thing, and a "contract of marriage" another, falling short of the marriage itself. The authority of Perkins, sect. 306, (who from his citation of the Year Books may be placed conveniently amongst the decisions of the
p. 5. Courts of Law,) is to the same effect. "If a man seised of land in fee make a "contract of matrimony with I. S., and he die before the marriage is solemnized "between them, she shall not have dower, for she never was his wife." Perkins, indeed, goes on to say, in the same section, "and it hath been holden in the "time of King Henry III. that if a woman had been married in a chamber that "she should not have dower by the Common Law; but the law is contrary at "this day." But, whatever is his opinion of the alteration of the law as to the case of the private marriage (by which he probably meant the Ecclesiastical Law as to the solemnities requisite, which in fact had been altered), still it has no relation to his first position, which is full, complete, and express to the very point now under consideration. His observation amounts to no more than this, that in Henry the Third's time a marriage was held void which in his day (the reign of Queen Elizabeth) would be held irregular only; and, further, the observation is strong, that Perkins must have meant a different thing by the two phrases, "contract of matrimony" and "marrying in the chamber;" and what other difference can be suggested, except that the one was a contract by words only, the other a contract accompanied by a religious ceremony?

Again, the doctrine laid down by Perkins, title Feoffments, Placitum 194, (for which he cites the Year Book, 38 Edward III. 12), shows the diversity at that time of day between a contract and a marriage. "If a contract of marriage be "between a man and a woman, yet one of them may enfeoff the other, for yet "they are not one person in law, inasmuch as if the woman dieth before the "marriage solemnized betwixt them, the man unto whom she was contracted "shall not have the goods of the wife as her husband, but the wife thereof may "make a will without the agreement of him unto whom she was contracted, "&c.;" and at the close of the next placitum he says, "but after the marriage "celebrated between a man and a woman the man cannot enfeoff his wife, for "then they are as one person in law." Bracton, in book 2, chapter 9, entitled "Si vir uxori donationem facere possit constante matrimonio," may be thought to leave the matter in some doubt whether such gifts would be good even after the contract, as he says, "Matrimonium autem accipi possit sive sit publice "contractum vel fides data quod separari non possunt; et revera donationes

" inter virum et uxorem constante matrimonio valere non debent." Now, even if it is considered that by the fides data, Bracton understood a contract *per verba de præsenti*, without any solemnity, it is enough to say he could not be writing as a common lawyer (in fact he was a civilian) when he is found to differ from the authority of the Year Books.

The case of *Bunting* v. *Lepingwell* (Moore, 27 & 28 Elizabeth) is of great weight, and of immediate bearing upon the point in question. Taking the facts from the two reporters (Moore, 169, and 4 Coke, 29 a), it appears that Bunting and Agnes Addishall contracted matrimony between them *per verba de præsenti tempore*, and afterwards Agnes took to husband Thomas Twede, and cohabited with him, and afterwards Bunting sued Agnes in the Court of Audience, and proved the contract, and the sentence was pronounced, " Quod prædicta Agnes " subiret matrimonium cum præfato Bunting, et insuper pronuntiatum decretum " et declaratum fuit dictum matrimonium fore nullum, &c.;" which marriage between Bunting and Agnes took place according to the sentence, and they had issue one Charles Bunting; and whether Charles Bunting was son and heir was the question for the jury in an action of trespass brought by him, and the Court held him legitimate, and no bastard. The argument before the Court turned principally on the invalidity of the sentence of the Spiritual Court, by reason of Twede, the husband *de facto*, not being made a party to the proceedings by which his marriage was declared null; the Court, however, holding themselves bound to give credit to the Spiritual Court that their proceedings were regular. But the bearing of the case upon the point under discussion is, whether it establishes a distinction between the contract to marry and " ipsum matrimonium," and such seems the necessary inference. This was a trial before the judges of the Common Law, who called for the assistance of civil lawyers to argue the case before them, but who must be supposed to know themselves what was the Common Law; and if the contract *per verba de præsenti* between Bunting and Agnes had been what the Common Law had then recognized as an actual marriage, the second marriage would have been held void without any controversy, no doubt would have existed, and no civilian would have been consulted, any more than if it had been a marriage celebrated *in facie ecclesiæ*. It is also not unworthy of remark, that the sentence of the Spiritual Court, " Quod prædicta Agnes subiret matrimonium cum præfato Bunting," proves that not even by the Ecclesiastical Law, as administered in England, was such contract held to constitute a complete marriage without the intervention of the religious ceremony. p. 6.

The case of *Wild* v. *Chamberlayne*, 2d Shower, page 300, is so far of importance as it affords direct proof that in the opinion of Chief Justice Pemberton on the trial of an issue, " Marriage or no Marriage," words of contract *de præsenti tempore*, repeated after a person in orders, was a good marriage, for it was only by importunity of counsel a case was to be made thereof. If such a contract, alone and unaccompanied by a religious ceremony, had been a marriage, surely the case would have been decided on a shorter ground, and the objections, that the parson was an ejected minister, and that the ring was not used at the ceremony, according to the ritual of the Church of England, would never have been urged.

In the case of *Haydon* v. *Gould*, 1 Salkeld, 119, Haydon and his wife were Sabbatarians, and married by one of their ministers in a Sabbatarian congregation, using the form of the Common Prayer, except the ring; but the minister was a mere layman, and not in orders; and after administration granted to Haydon, and subsequently repealed, the Court of Delegates affirmed the sentence of repeal. The reason given is, " that Haydon, demanding a right due to him " as husband by the Ecclesiastical Law, must prove himself a husband according " to that law to entitle himself in this case." In this case, the book adds, it is urged that this marriage was not a mere nullity, because by the law of nature it

was sufficient; and though the positive law ordains it shall be by a priest, yet that makes such a marriage as this irregular only, but not void; but the Court ruled ut supra, the reporter adding, that the constant form of pleading marriage is "per presbyterum sacris ordinibus constitutum." Perhaps the more correct expression might have been, "per ministrum sacris ordinibus constitutum;" for, undoubtedly, after the Reformation, a marriage might as well be solemnized by a deacon as a priest. But what is the whole result of the case but this, that by the English Ecclesiastical Law a contract of marriage *per verba de præsenti* was not alone sufficient (for such contract there was in fact); but that by the same law, to make the marriage complete, there must be the presence an intervention of the priest? And when it is asked, as it was at your Lordships bar, what had the priest to do, or what had he to say? the answer must be, that he married them, and in doing so he used such form of words as were customary at the time of his performing the ceremony. The words of present contract found in the ritual of the Church of England as established by the authority of parliament in the 2 & 3 Edward VI. cap. 1, was not then for the first time made, but in part altered and in part retained from the former rituals which had been handed down from the greatest antiquity, just as it was declared by the Council of Trent (session 24, c. 1), when it prescribes certain words to be used by the parish priest when performing the office of matrimony; viz. "Ego vos in matrimonium "conjungo, in nomine Patris et Filii et Spiritus Sancti." The decree also adds, "vel aliis utatur verbis, juxta receptum uniuscujusque provinciæ ritum."

The only remaining decision of a Court of Common Law to which it may be necessary to refer is the case of the *Queen* v. *Fielding*, upon an indictment for bigamy, 14 State Trials, 1327. The evidence given of the first marriage was, that the parties made a contract *per verba de præsenti* in English, in the presence of and following the words of a priest in orders, though he was a priest in the orders of the Church of Rome; and Mr. Justice Powell, in summing up the case to the jury, more than once adverts to the fact that the marriage *was by a priest*. "If you believe Mrs. Villars," he says, "there was a marriage by a "priest." There is no reason to infer from this direction to the jury, that if the first marriage in this case had been merely a contract *per verba de præsenti*, in the presence of a layman, the offence of bigamy must have been committed, but the inference to be drawn from the summing up of the judge is directly the reverse.

p. 7. My Lords, this being the state of the decided cases from the earliest time to the time of Queen Anne, the principal direct authority adduced on the part of the crown is the dictum of Lord Holt, in *Jesson* v. *Collins*, 2 Salk. 437, "that a "contract *per verba de præsenti* was a marriage, and this is not releaseable," and the decisions which have subsequently taken place. That case came before the court upon a motion for a prohibition, upon a suggestion that the contract was in fact *per verba de futuro*, for which the party had remedy at Common Law, and the case was disposed of by the Court, and the prohibition refused, upon the ground that the Spiritual Courts have jurisdiction of all matrimonial causes whatsoever, ond that there was no reason to prohibit them, because this may be a future contract for breach of which an action at law will lie. This appears distinctly from the reports of the same case in 6 Modern, 155, and Holt's Reports, 457. This being the state of the case, Holt, Chief Justice, in speaking to it before the Court, used the expression above referred to. It is obvious, in the first place, it was unnecessary to the case before the Court; for, whether present words or future words, the prohibition must equally be refused. The observation, therefore, is not entitled to the same weight and authority as if it had been the very point of the case before the Court. If by the terms "*ipsum matrimonium*," Lord Holt intended to lay down the position that it was so held by the Common Law of the land, notwithstanding the unbounded respect which

all who have succeeded him have ever felt and still feel for his learning and ability, we cannot accede to his opinion. If, however, the observation was intended with reference to the Civil Law or the Canon Law of Europe, then it is perfectly correct; and that such was the intention of Lord Holt we think abundantly clear from *Wigmore's case*, which follows the former in the same page of Salkeld, and which was decided three years later than the first. In that case the husband was an Anabaptist, and had a licence from the bishop to marry, but married this woman according to the forms of their own religion. Et per Holt, C. J., "by the Canon Law a contract *per verba de præsenti* is a marriage."

In Holt's Reports the expression is precisely the same, "by the Canon Law;" and Lord Chief Justice Holt is there made further to say, "In the case of a "Dissenter married to a woman by a minister of the congregation who was not "in orders, it is said that this marriage was not a nullity, because by the law of "nature the contract is binding and sufficient; for though the positive law of "man ordains that marriages shall be made by a priest, that law only makes "this marriage irregular, and not expressly void; but marriages ought to be "solemnized according to the rites of the Church of England to entitle the pri-"vileges attending legal marriage, as dower, thirds, &c." It cannot be supposed that Lord Holt would limit the observation to the Canon Law, as undoubtedly he did in *Wigmore's case*, if it had been maintainable in the larger and unqualified extent supposed to have been stated by him in the case of *Jesson* v. *Collins;* and if the latter statement agrees with all the authorities, and the former is not, as we conceive, supported by or consistent with them, we are bound to infer, either that there is some error in the reporter, or that he really meant the proposition to be limited to its more restrained sense.

My Lords, this dictum of Lord Chief Justice Holt is of the more importance because it appears to have been the origin of all the subsequent opinions expressed by different judges to the same effect. When Sir William Scott lays it down as the law recognized by the Temporal Courts of this kingdom, he cites this dictum of Lord Chief Justice Holt, which he observes (as he is justified in doing by the report in 6 Modern) was agreed to by the whole bench. When Gibbs, Chief Justice, makes the same observation, he expressly relies on the authority of Sir William Scott (*Lautour* v. *Teesdale*, 8 Taunton, 832.) When Lord Kenyon makes a similar observation, probably on the same authority, observe how carefully he guards himself. "I think," he says, "though I do not "speak meaning to be bound, that even an agreement between the parties *per* "*verba de præsenti* is *ipsum matrimonium*."—(*Reed* v. *Passer and others*, Peake's Nisi Prius, N. P., 303.) When Lord Ellenborough lays down the same doctrine in *Rex* v. *The Inhabitants of Brampton*, (10 East, 289,) he is giving judgment in a case of a marriage *per verba de præsenti* celebrated by a priest (though whether Roman Catholic or Protestant, he says, does not appear),—and when he refers to the authority of Holt, Chief Justice, it is clear he considered Lord Holt to have been speakiug of a marriage through the intervention of a priest. It is, therefore, of very great importance to estimate justly the weight of Lord Holt's observation when contrasted with the large field of authorities which has been opened, upon which authorities I have been longer occupied, because the question whereon we are called to answer depends upon the Common Law of England, of which the Ecclesiastical Law forms a part. p. 8.

It will be improper, however, to close the discussion of this part of the case without adverting to an argument urged at your Lordships bar, upon which some reliance appears to have been placed, namely, the state of the marriages of Quakers (all doubt as to which marriages is now set at rest by the statute passed in 1835) and of Jews.

The argument in substance was this, that, as the persons professing the opinions of those respective persuasions celebrated their marriages according to

their own peculiar rites, which necessarily excluded the intervention of a person in holy orders, according to the sense which those words are asserted to convey, and as their marriages have been held legal with respect (as it is argued) to all the consequences attending marriage, such as legitimacy, administration, and other civil rights, so the validity of such marriages can only be grounded upon the assumption that a contract of marriage *per verba de præsenti* did by law constitute the marriage itself.

Since the passing of the Marriage Act it has generally been supposed that the exception contained therein as to the marriages of Quakers and Jews amounted to a tacit acknowledgment by the legislature that a marriage solemnized with the religious ceremonies which they were respectively known to adopt ought to be considered sufficient; but before the passing of that act, when the question was left perfectly open, we find no case in which it has been held that a marriage between Quakers was a legal marriage on the ground that it was a marriage by a contract *per verba de præsenti*; but, on the contrary, the inference is strong, that they were never considered legal. The legislature, in the statute 6 & 7 Will. III. cap. 6, sec. 63, enacts, that all Quakers and Jews, and any other persons who should cohabit and live together as man and wife, should pay the duty thereby imposed on marriages, and that upon every *pretended marriage* made by them they should give five days' notice; with an express provision in the 64th section, that nothing in the act contained should be construed "to make good or effectual in law any such marriage or pretended marriage, "but that they should be of the same force and virtue, and no other, as if the "act had not been made." And the case before Lord Hale, to which so much weight was attributed, as conveying his opinion that the marriage was good, appears rather to show his opinion to have been the reverse. He declared "that he was not willing, on his own opinion, to make their children bastards, "and gave directions to the jury to find it special;" a declaration which plainly intimates that the inclination of his own mind was that the marriage was not good. We cannot, therefore, think that the case of the Quakers, although certainly one which it is difficult altogether to dispose of, amounts to such a difficulty as to induce us to alter the opinion founded on the authority of the decided cases.

And as to the case of the Jews, it is well known that in early times they stood in a very peculiar and excepted condition. For many centuries they were treated, not as natural-born subjects, but as foreigners, and scarcely recognized as participating in the civil rights of other subjects of the crown. The ceremony of marriage by their own peculiar forms might therefore be regarded as constituting a legal marriage, without affording any argument as to the nature of a contract of marriage *per verba de præsenti* between other subjects. But even in the case of a Jewish marriage it was more than a mere contract, it was a religious ceremony of marriage; and the case of *Lindo* v. *Belisario* is so far from being an authority that a mere contract was a good marriage, that the marriage was held void precisely because part of the religious ceremony held necessary by the Jewish law was found to have been omitted.

I proceed now to refer to certain statutes passed by the legislature at different times, from various enactments and expressions in which statutes the inference
p. 9. appears to follow, that a mere contract *per verba de præsenti* could not at those several times have been generally held to constitute complete marriage.

The statute 32 Hen. VIII. cap. 38, for marriages to stand notwithstanding pre-contracts, in its preamble gives no support to the doctrine, that by the Law of England the contract *per verba de præsenti* was an actual marriage. It recites the mischief, that after divers marriages have been solemnized and consummated, and fruit of children, "nevertheless by an unjust law of the bishop "of Rome, which is that upon pretence of a former contract made and not con-

" summate, the same were divorced and separate," and then proceeds to enact, that every marriage, being contracted and solemnized in face of the Church, and consummated, or with fruit of children, shall be deemed lawful, good, and indissoluble, notwithstanding any *pre-contract* not consummate which either party shall have before made.

The statute 2 & 3 Edw. VI. cap. 23, enacts, that, as concerning pre-contracts, " the former statute should be repealed, and be reduced to the state and order " of the king's Ecclesiastical Laws of this realm" (an expression of no slight importance, when considered with reference to the force within this kingdom of the general Canon Law of Europe), " which before the making of the said sta- " tute were used in this realm, so that, when any cause or contract of marriage " is pretended to have been made, it shall be lawful to the king's Ecclesiastical " judge of that place to hear and examine the said cause, and (having the said " contract sufficiently and lawfully proved before him) to give sentence for " matrimony, commanding solemnization, cohabitation," &c. The language of the legislature in this act does surely imply a marked and acknowledged distinction between contract and matrimony. To refer, next, to the statutes passed relating to the marriages of priests, the 31 Hen. VIII. cap. 14, punishes with death any priest who shall carnally keep or use any woman " to whom he is or " shall be married, or with whom he hath contracted matrimony," thus assuming the contract to be one thing, actual matrimony to be another, although visiting both offences with the same measure of punishment.

The statute 12 Charles II. cap. 33, entitled " An Act for Confirmation of Marriages," enacts, " that all marriages had and solemnized after a certain day " before any justice of the peace shall be adjudged and taken to be of the same " and of no other force and effect as if such marriage had been had and solemnized " according to the rites and ceremonies established or used in the Church or " kingdom of England." It is true that act is declared to be passed " for the " preventing and avoiding all doubts and questions touching the same;" but as the act or ordnance referred to contained a form of contract *per verba de præsenti* of the most accurate and precise description, and before witnesses, it affords ground to infer that a contract of that nature had not, in the general opinion, the force of an actual marriage; and observe how very strong the inference is from the proviso, " that issues on the point of bastardy or lawfulness of mar- " riage, depending on these marriages, should be tried by a jury." Why not let them go to the Ecclesiastical Court, as before, if by the law of that Court the contract *per verba de præsenti* was held an actual marriage without any religious ceremony?

The statute 7 & 8 Will. III. cap. 35, passed to enforce the laws which restrain marriages without licence or banns, had for its object the levying a revenue by the stamps imposed by a former act upon licences of marriages. For this purpose it lays a penalty of 10*l*., by the 4th section, " on every man so married " without licence or publication of banns as aforesaid;" that is, upon reference to the preceding clause, " married by any parson, vicar, curate, or other minister " as their substitute." If the legislature had thought a contract *per verba de præsenti* before any person not being in holy orders was a valid marriage, it surely would not have left the remedy so defective, but would have enacted that every man married without a licence shall be made liable to the penalty.

The statute 10 Anne, cap. 19, is an act for raising money for the use of the kingdom; and in section 176 provision is made to prevent the great loss of duties on marriage licences which had been sustained by the frequency of clandestine marriages. The provision is, that every parson, vicar, or curate, or other person in holy orders, who shall after a certain day marry any person in any church or chapel, or in any other place whatsoever, without publication of banns, or without licence first had from the proper ordinary for such marriage, p. 10.

shall forfeit 100*l.* Would this penalty have been limited to the case of marriage by a person in holy orders if it had not been conceived by the framers oi the act that a contract *per verba de præsenti* alone, without the aid of the priest, had constituted a complete marriage? The inference arising from these acts is not certainly so very strong, but whatever inference can be drawn has a tendency to support the opinion at which we have arrived.

The various acts of parliament which have been passed from time to time, and which have been referred to in the course of the argument, imposing penalties on the solemnization of marriages by Roman Catholic priests in Ireland between Protestants, or between a Protestant and a Roman Catholic, and nullifying such marriages, are founded in good sense, and with a view to attain a definite object, upon the supposition that the presence of a priest is necessary to make the marriage good, and upon that supposition only; but they are a mere dead letter, if the contract *per verba de præsenti* without the priest makes the marriage. And if this is no proof, as perhaps it is not, that such was necessarily the law, it is at least a proof that it was the prevailing general opinion, both amongst the people and the government, that by law the presence of the priest was essential to the contract.

But upon referring, in the last place, to the statute 26 Geo. II. cap. 33, the act for the better preventing clandestine marriages, it will be found the provisions thereof throw a stronger light upon the subject. If a contract *per verba de præsenti* had been considered by the legislature as "ipsum matrimonium," one would have expected that all such contracts made after the act came into force, if not made illegal, would at least be declared to be null and void. There could have been no more effectual mode of suppressing clandestine marriages; but there is no such enactment. The only clause that affects these contracts is the 13th, which enacts only "that no suit or proceeding shall be had in any "Ecclesiastical Court in order to compel a celebration of any marriage *in facie* "*ecclesiæ*, by reason of any contract of matrimony whatsoever, whether *per verba* "*de præsenti* or *per verba de futuro*, which shall be entered into after the 25th "March, 1754." These contracts *per verba de præsenti* are still, therefore, lawful, though they cannot be enforced in an Ecclesiastical Court. If these contracts did not before and at the time of passing the act constitute a valid marriage, but were only necessary means,—the basis, for enforcing the solemnization,—there is then no injury in leaving them as they were; but if they ever constituted a valid marriage of themselves, not being made null by the act, so do they still; and then may some great and almost inextricable difficulties occur from the absence of such provision.

Before the passing of the act, and indeed since, put the case that A. made a contract of marriage *per verba de præsenti* with B., and then, in the lifetime of B., marries C. *in facie ecclesiæ*, and that he has children at the same time both by C. and B.; B. dies; are the issues of both legitimate? It is clear from the decisions, that the issue of A. and C. are legitimate; and if the argument on the part of the crown, that the contract with B. make the marriage, be well founded, the issue of B. is legitimate also. Suppose two sons, born at the same time, one from each mother, a possible event, which is the eldest son and heir? This and many more cases of difficult solution may be put, if the contract *per verba de præsenti* was by the English law held to be actual marriage; and from these considerations arise the necessary inference, that it was not; and thus do arguments from the enactments of the legislature combine and agree with the authority of the decided cases, to prove that such never was the law of England.

My Lords, I proceed, in the last place, to endeavour to show that the law by which the Spiritual Courts of this kingdom have from the earliest time been governed and regulated is not the general Canon Law of Europe, imported as a

body of law into this kingdom, and governing those Courts *proprio vigore*, but, instead thereof, an Ecclesiastical Law, of which the general Canon Law is no doubt the basis, but which has been modified and altered from time to time by the ecclesiastical constitutions of our archbishops and bishops, and by the legislature of the realm, and which has been known from early times by the distinguishing title of the King's Ecclesiastical Law. And if it shall appear, upon reference to this law, that there is no incontrovertible authority to be found therein that marriage was held to be complete before actutal celebration by a priest, the absence of such direct authority in the affirmative is sufficient to justify us in drawing the conclusion already formed, that the contract alone is not by the Law of England the actual marriage. The result, however, of a somewhat hasty consideration of the authorities upon this question (for the due research into which we were anxious to have obtained a longer time) appears to us to be, that no such rule obtained in the Spiritual Courts in this kingdom. p. 11.

It would scarcely have been necessary to have entered upon this part of the discussion, had it not been for the observations made by Sir William Scott in the case of *Dalrymple* v. *Dalrymple*. That very learned judge, after laying down in his deservedly celebrated judgment in that case, that marriage is a contract of natural law and of civil law also, proceeds to observe, " that when the " natural and civil contract was formed, the law of the Church, the Canon Law, " considered it had the full essence of matrimony without the intervention of " the priest," which Canon Law is then stated by that eminent judge to be " the " known basis of the matrimonial law of Europe." The observation upon which so much reliance has been placed by the counsel for the crown then follows: " that the same doctrine is recognized by the Temporal Courts as the existing " rule of the matrimonial law of this country," although certainly the observation is in some degree qualified by the expression, " that the Common Law had scru- " ples in applying the civil rights of dower and community of goods and legiti- " macy in the case of these looser species of marriage."

My Lords, as we have already stated in the opinion we have given that we do not conceive it to be part of the law of the Temporal Courts that " when the " natural and civil contract was formed it had the full essence of matrimony " without the intervention of the priest," it is only proper to state, in the first place, that the entertaining, as we do, a different view of this subject from that eminent judge, does not in any manner whatever break in upon the authority of the decision in the case of *Dalrymple* v. *Dalrymple*.

The doctrine of the Temporal Courts in England had no bearing at all upon a question which was to be decided solely by the law of Scotland, which country, it is well known, differs materially from ours in many of its legal institutions, and in none more pointedly than those which relate to marriage and legitimacy. Again, it was of no importance in that case whether the Canon Law of Europe was introduced into England as part of the law of the land; the only question necessary for the decision of the case then before the Court being, whether snch Canon Law was introduced or not into the law of Scotland. The opinion, therefore, of that eminent person, so far as regards England, was uncalled for and extra-judicial, and upon that ground the question before us must be considered as unfettered by the weight of such great authority, and open to the most free discussion.

But that the Canon Law of Europe does not, and never did, as a body of laws, form part of the law of England, has been long settled and established law. Lord Hale defines the extent to which it is limited very accurately, " The rule," he says, " by which they proceed is the Canon Law, but not in its full latitude, " and only so far as it stands uncorrected either by contrary Acts of Parliament " or the Common Law and custom of England, for there are divers canons made

"in ancient times, and decretals of the Pope that never were admitted here in "England." (Hale's History of Common Law, cap. 2.)

Indeed the authorities are so numerous, and at the same time so express, that it is not by the Roman Canon Law that our judges in the Spiritual Courts decide questions within their jurisdiction, but by the King's Ecclesiastical Law, that it is sufficient to refer to two as an example of the rest. In *Caudrey's case*, 5 Coke, 1, which is entitled "Of the King's Ecclesiastical Law," in reporting the third resolution of the judges, Lord Coke says, "As in temporal causes the "King, by the mouth of the judges in his Courts of Justice, doth judge and de- "termine the same by the temporal laws of England, so in cases ecclesiastical "and spiritual, as, namely," (amongst others enumerated) "rights of matrimony, "the same are to be determined and decided by ecclesiastical judges according "to the King's Ecclesiastical Law of this realm;" and a little further he adds, "So, albeit the Kings of England derived their Ecclesiastical Laws from others, "yet so many as were proved, approved, and allowed here, by and with a general
p. 12. "consent, are aptly and rightly called 'The King's Ecclesiastical Laws of Eng- "land.'" In the next place, Sir John Davies, in his Reports, p. 69, "Le "Case de Commendams," shows how the Canon Law was first introduced into England, and fixes the time of such introduction about the year 1290, and lays it down thus: "Those canons which were received, allowed, and used in Eng- "land were made by such allowance and usage part of the King's Ecclesiastical "Laws of England, whereby the interpretation, dispensation, or execution of those "canons, having become laws of England, belong solely to the King of England "and his magistrates within his dominions;" and in page 72 he adds, "Yet all "the Ecclesiastical Laws of England were not derived and adopted from the "court of Rome; for long before the Canon Law was authorized and published" (which was after the Norman Conquest, as before shown), "the ancient Kings "of England, viz., Edgar, Athelstane, Alfred, Edward the Confessor, and others, "did, with the advice of their clergy within the realm, make divers ordinances "for the government of the Church of England, and after the Conquest divers "provincial synods were held, and many constitutions were made in both the "kingdoms of England and Ireland, all which are part of our Ecclesiastical "Laws of this day."

We therefore can see no possible ground of objection to the inquiry, whether before the introduction of the Canon Law any law existed upon the subject of marriage differing from that of the Canon Law, and not afterwards superseded thereby; and when we find, in the collection of ancient laws and institutes of England, published by the Commissioners of Public Records, amongst the laws of Edmund, one which directs that at the nuptials there shall be a mass priest by law, who shall "with God's blessing bind the union to all posterity," we can see no more gound to doubt the existence of this law, (which does not now make its appearance for the first time, but was published by Wilkins in the last century,) than any other document of antiquity which has been received as genuine without hesitation.

The council held at Winchester in the time of Archbishop Lanfranc, in the year 1076, (see Wilkins' Concilia, 367, and Johnson's Collection,) contains a direct and express authority with a nullifying clause, that a marriage without the benediction of the priest should not be a legitimate marriage, and that other marriages should be deemed fornication. Numerous councils follow, in which are decrees to prevent and punish clandestine marriages, but in no one of which is there any repeal, express or implied, of the rule laid down by the first, viz., that the presence of the priest is necessary to constitute a legitimate marriage; but the time of the marriage by the priest, the place where it is to be celebrated, and other regulations, are prescribed, in order to meet the evil which was then existing. That the marriage, though called clandestine, was still a marriage

celebrated by a priest, and so assumed to be, is placed beyond all doubt by the 11th Constitution of Archbishop Stratford, established by the Council of London, (see 2 Wilkins' Concilia, 706.) "De celebrantibus matrimonia clandestina in "ecclesiis oratoriis vel capellis." That constitution recites in effect, that people left their own places of residence, where the impediments to their marriage were notorious, and their parish priests not disposed to solemnize their marriage, and betook themselves to populous places where they were unknown, in order that "aliquoties in ecclesiis aliquando in capellis seu oratoriis matrimonia inter ipsos "de facto solemnizari procurent." What is this but a plain assumption, that the marriage so celebrated was celebrated by a priest, for surely none others but persons in holy orders could celebrate them in churches, chapels, or oratories?

The authority of John De Burgo, a dignitary of the Church of England, was much relied on, as a direct proof that a contract *per verba de præsenti* was sufficient to constitute complete matrimony, without the presence or intervention of a priest. The materials of his work, bearing the quaint title of Pupilla Oculi, were compiled in 1385, and the work itself printed at Paris; but afterwards, in the year 1400, an edition was printed in London, "Omnibus Presbyteris pre-"cipue Anglicanis summe necessaria." The work contains, amongst other things, a Treatise on the Administration of the Seven Sacraments; and under the head "De Sacramento Matrimoniali" occurs the passage relied on by the crown. The author lays it down, "of the minister of this sacrament it is to be "observed, that no other minister is to be required distinct from the parties "contracting, for they themselves for the most part minister this sacrament to p. 13. "themselves, either the one to the other, or each to themselves." And a little further he adds, "Scotus says, that to the conferring of this sacrament there is "not required the ministry of a priest, and that the sacredotal benediction which "the priest is wont to make or utter upon married people, or other prayers "uttered by him, are not the form of the sacrament nor of its essence, but "something sacramental pertaining to the adorning of the sacrament." From this passage it is clear, that, whether absolutely necessary or not, it was at least usual and customary at that time to make the contract before the priest. It appears further, from the first words of the following chapter, "De matrimonio "clandestino," that such course was ordered by the Church:—"Inhibitum est "contrahere nuptias occulte sed publice coram sacerdote sunt nuptiæ in Domino "contrahendæ." If, therefore, in the passage above cited, the author intends to express thus much only, and no more, viz., that by the contract *per verba de præsenti*, made privately between themselves, that mysterious sacrament of which he is speaking has been taken by them which makes the contract indissoluble, and capable of being enforced by either against the other *in facie ecclesiæ*, such doctrine is admitted to be consistent with the Ecclesiastical Law received in England: but if it is supposed to mean more,—if it is held up as an authority that the marriage is complete for all civil purposes of legitimacy, dower, and other civil rights,—then, before we accede to the proposition, it is the safer course to discover, if possible, whether the doctrine of the text writer is or is not consistent with the recognized laws and constitutions of the Church of England then in force, and with the course and practice of the Ecclesiastical Courts of England at that time; and in case of a discrepancy between them, to reject the authority of the text writer, and to adhere to that of the recognized law and the practice of the Courts; for there is no surer evidence of the law in any particular case than the course and practice of the Courts in which such law is administered. We should treat the best of our text writers, Sir William Blackstone, for example, precisely in the same way.

Now, at the time of the publication of John de Burgo, and of the other work, entitled "Manipulus curatorum," cited for the same purpose, there stood, unrepealed by any subsequent Constitution of the Church, both the Constitution of

Lanfranc, before stated, and the subsequent Constitutions of the Church against clandestine marriages, the former directly declaring the presence of the priest at the marriage to be necessary to give it validity; the latter implying such necessity. I ask whether the Courts of Ecclesiastical Law of England would take the law, if the very point in controversy was brought before them, from the text writers of the day, or from the Constitutions of the Church? I doubt not, however learned, or in whatever estimation the text writers might be, it would be from the Law of the Church; and as to the course and practice of the Courts of Ecclesiastical Law in respect to a matrimonial suit to enforce marriage upon a contract *per verba de præsenti* the prayer upon the libel has been, not to pronounce that the parties are already actually and completely married, but that it may be pronounced "for the validity, full force, and strength of the said con-"tract of marriage to all effects and intents in law whatsoever; and that the "defendant may de compelled to solemnize the said marriage in the face of the "Church," Clerk's Instructor, 326; just as in *Bunting's case*, before cited, the decree was not that Agnes was married, but that Agnes "matrimonium subiret."

And when reference is made to Oughton, vol. 1, 283, the same appears more distinctly to be the form of proceedings; and it would be most singular, if the contract *per verba de præsenti* was considered by the Court as an actual complete marriage, that a provision should be made for the Court to inhibit the party "pendente lite, from contracting matrimony, or procuring matrimony to "be solemnized." If the Court held the first marriage to be entirely complete, surely the statute of James, which had then been passed more than a century, and which made the second solemnization a felony, would have been a surer protection than the inhibition of the Court. But the necessary inference is, that the Court could not have so held the effect of the contract; and it follows, therefore, that the authority of the passages above cited cannot be safely relied on, against the Constitutions of the Church and the practice of the Spiritual Court.

p. 14. We now pass to the consideration of the particular circumstances involved in the first question proposed by your Lordships, which supposes this marriage to have taken place in the house and in the presence of a placed and regular minister of the congregation of Protestant dissenters called Presbyterians.

As we have already stated our opinion, that, to make the marriage a complete marriage, it must be solemnized in the presence of a minister in holy orders, it is only necessary to look back to the time when that law first obtained in England to enable us to answer that question without difficulty.

At the early period when such law arose, and down to a comparatively recent period, the expression priest, curate, minister, deacon, and person in holy orders, which are the words met with in the different constitutions and councils and authorities bearing on the point, could point to those persons only who had received episcopal ordination; there were no others known at all; all but they were laymen; and unless some act of the legislature has interposed its authority, and given the Protestant dissenting minister in Ireland the same power for this purpose as the persons in holy orders did before possess, we think the entering into the contract in his presence cannot, in the legal sense of the word, be held to be entering into it in the presence of a person "in holy orders." Now no statute has been brought forward, except the 21 & 22 Geo. III. cap. 25 (Irish), but the operation of that statute is limited to matrimonial contracts or marriages between Protestant dissenters, and solemnized by Protestant dissenting ministers or teachers; and as your Lordships' question goes on to state, that one of the contracting parties in this case is not a Protestant dissenter, but a member of the Established Church of England and Ireland, it follows that the case does not fall within that statute, and that it must be decided as if that statute had never been passed.

My Lords, the two subsequent conditions or circumstances contained in your

Lordships' question can obviously make no difference. The form of the religious ceremony cannot, upon any principle or upon any authority, compensate for the want of the presence of the proper minister, assuming such presence to be necessary; nor can the circumstance of subsequent cohabitation carry the validity of the marriage higher than the original force of its obligation.

The main and principal point, however, of your Lordships' first question still remains to be answered; viz. whether after such a contract entered into between A. and B., whether A. by marrying C. in England whilst B. is still living commits the crime of bigamy.

And after the full discussion of the general question, and our opinion already declared, that the first contract does not amount to a marriage by the Common Law, it is hardly necessary to say, that we hold the offence of bigamy has not been committed. Indeed, independently altogether of the answer we have given to that abstract question, and admitting for the sake of argument, that the law had held a contract *per verba de præsenti* to be a marriage, yet, looking to the statute upon which this indictment is framed, we should have thought, upon the just interpretation of the words of that statute, the offence of bigamy could not be made out by evidence of such a marriage as this. The words are, " If any per-" son, being married, shall marry any other person during the life of the first hus-" band or wife;" words which are almost the very same as those in the original statute of James the First. Now the words " being married," in the first clause, and the words " marry any other person," in the second, must of necessity point at and denote marriage of the same kind and obligation. If, therefore, a marriage *per verba de præsenti*, without any ceremony, is good for the first marriage, it is good also for the second; but it never could be supposed that the legislature intended to visit with capital punishment (for the offence would be capital if the plea of clergy could be counter-pleaded) the man who had in each instance entered into a contract *per verba de præsenti*, and nothing more. Waiving, however, that consideration, it is enough to state to your Lordships, as the answer to the first question, that in our opinion A. did not, under the circumstances therein stated, commit the crime of bigamy.

My Lords, we have so fully and pointedly answered the second question proposed by your Lordships, in stating the grounds of our first answer, that it is unnecessary to trouble you with any further observations thereon, except, that as the statute of 58 Geo. III. cap. 81, has enacted that no suit shall be had to compel the celebration of such a contract in any Ecclesiastical Court in Ireland, we think this question also should be answered in the negative. p. 15.

In conclusion, I would only observe, that although I am authorised to state our opinion on the questions proposed to us is unanimous, yet that my learned brethren are not to be held responsible for the reasoning upon which I have endeavoured to establish the validity of that opinion.

---

N.B. *The marginal numbers in this and the preceding pages of the Appendix denote the pages in the original Parliamentary Paper.*

# No. II.

## OPINION of the Law Officers and others, 1818, on Indian Marriages.

We are of opinion, that marriages of British subjects in India are governed by the Law of England; but that the particular provisions of the Marriage Act (26 Geo. 2, cap. 33) do not extend to India.

That marriages celebrated in India by Ministers of the Church of Scotland are not, to all purposes, legal marriages.

That such marriages are *binding upon the parties*, so that *a subsequent marriage by either, during the life of the other, with a third person, would be void.*

That such marriages, in Courts of Common Law, would be considered as marriages *de facto*, and would entitle the husband *de facto* to maintain personal actions in respect of the property of his wife, but no real actions.

That the wife would not be entitled to dower, or to bring an appeal of death, or the husband to courtesy of lands in England.

That it is at least *doubtful* whether they would be entitled to administration of each others goods, or whether the children of such a marriage would be entitled to inherit dignities or lands in England, or to administration of the personal property of their parents; or, *whether, in case of a second marriage, an indictment for bigamy could be maintained.*

That, as doubts have prevailed upon this subject, it is highly expedient, that an Act of Parliament should be obtained to legalize such irregular marriages as have already taken place, and to declare the law for the future.

(Signed) Chr. Robinson, — Cooke,
S. Shepherd, J. B. Bosanquet,
R. Gifford, M. Swabey,
— Lens, S. Lushington.

# IRISH MARRIAGE QUESTION.

---

# OBSERVATIONS

ON

## THE OPINION

DELIVERED BY

THE RIGHT HONOURABLE

## THE LORD COTTENHAM,

23d OF FEBRUARY, 1844,

ON THE WRIT OF ERROR,

IN THE CASE OF

## THE QUEEN *v.* MILLIS.


---

BY SIR JOHN STODDART, KNT., LL.D.
LATE CHIEF JUSTICE OF MALTA.

---

LONDON:
HENRY BUTTERWORTH,
Law Bookseller and Publisher,
7, FLEET STREET.

1844.

LONDON :

PRINTED BY C. ROWORTH AND SONS,
BELL YARD, TEMPLE BAR.

# PREFACE.

THE case, to which the following pages relate, lies within a small compass. In 1829, George Millis and Esther Graham, the former a member of the Established Church, the latter a Presbyterian, went through a religious ceremony of marriage, in Ireland, taking each other, in words of present time, as husband and wife, according to the usual form of the Irish Presbyterian Church, in the house, in the presence, and by the intervention of a regular Presbyterian Minister, and for two years from that time they lived together openly and publicly as married persons. Such marriages, it is said, have been common in Ireland for a century or more, and have not till recently been called in question. Great numbers of couples have been so united. Some men, after having been married, in this form, to one female, have, in her life-time, married another in the Church. For so doing, they have been indicted under the statutes against bigamy; they have been convicted, sentenced, and have actually un-

dergone imprisonment, hard labour, and even transportation. Millis, having, subsequently to his union with Esther Graham, and in her life-time, married another woman, was, in like manner, indicted for bigamy, under a statute describing the offence thus: "If any person *being married* shall marry any other during the life of the first husband or wife." On the trial a special verdict was returned, finding the facts above stated, and was submitted to the Irish judges, a majority of whom held that Millis was not "married" to Esther Graham, in the sense of the statute, and consequently did not commit bigamy by the second marriage. This judgment was brought before the House of Lords by Writ of Error: and the Lords, after hearing counsel upon it, required, for their further information, the opinion of the Judges, nine of whom (it is said) met, and agreed with the majority of the Irish Judges, that the offence of bigamy had not been committed. That opinion was laid before the Peers, on the 7th of July, 1843, by Sir N. Tindal, Lord Chief Justice of the Common Pleas, who accompanied it with certain reasons of his own, (for which his learned brethren are not to be held responsible,) directed chiefly to show, that by the law of England, as it stood prior to 1753 within the realm, and as it still stands in many parts beyond the sea, a marriage contract, between two competent persons, in words of present time, did not constitute a marriage, without the

intervention of an episcopally ordained minister. As this is directly contrary to what the Author of the present publication has always understood to be law, and particularly to the doctrine of the late Lord Stowell in the case of *Dalrymple* v. *Dalrymple*, in 1811, (since recognized as correct by the highest authorities ecclesiastical and civil) the Author undertook to defend the impugned doctrine, in a letter to Lord Brougham, which was published in January last. It was not till after that letter had been printed, that he learnt that four law lords had spoken on the opinion of the judges, viz. Lord Abinger in favour of, and Lords Brougham, Campbell and Denman against it. At a subsequent meeting of the House of Lords, in February last, the Lord Chancellor and Lord Cottenham delivered their sentiments, agreeing that Millis was not guilty of bigamy, but differing widely in their reasons. The Lord Chancellor gave his entire sanction to the doctrine of Lord Stowell above stated: whilst Lord Cottenham denied it altogether. The Author, therefore, in support of his former production, drew up the present Observations. Whilst they were passing through the press, the Lords again met, and being equally divided, the judgment of the Irish judges, acquitting the prisoner, was of course affirmed, thus exonerating the individual, but leaving the general question open to future discussion. As the pendency of this question has caused much excitement in the North of Ireland,

and some legislative measures must soon be adopted, for placing the law, in this particular, on a satisfactory footing, the Author has thought it proper, that his Observations on Lord Cottenham's speech should be laid before the public.

# OBSERVATIONS

ON

## THE OPINION OF LORD COTTENHAM

IN THE CASE OF

## THE QUEEN *v.* MILLIS.

1. The eminent station which Lord Cottenham has filled, and the high reputation which he has acquired as an equity lawyer, rendered it natural that his opinion, on this important case, should be looked to with much anxiety. And adverting to the length of time he had had the case under consideration, and to the advantage he had enjoyed of hearing the elaborate opinions of other law lords upon it, there was reason to hope that he would have cleared away the few remaining difficulties that still hung about the subject, and thrown a clear and unwavering light on the conclusion, at which he might have arrived.

2. I own I confidently entertained that expectation; and therefore it was with a sense of regret, that I heard his Lordship open his speech with the remark, that "in the "course of a pretty long professional life, he had not met "with any case so *embarrassing* as the present." I found, too, that his Lordship had *vacillated* not a little in forming his opinion. He said, he "at first entertained a *very strong* "*impression* that the judgment was erroneous" (that is to say, he at first thought, with Lords Brougham, Denman and Campbell, that a marriage in Ireland, before a Pres-

byterian minister, one of the parties only being a Presbyterian, was lawful). And "he had *no slight wish*" (he said) "that it might be found so." Unfortunately (as I think) the noble and learned peer has discarded the impression, for reasons which, as he stated them, were far from carrying to my mind conviction. I have since examined them more carefully in a printed form, and with every desire to treat what falls from so eminent a personage with deference and respect, I must say that, to my humble apprehension, the reasons which appear to have wrought such a change in his Lordship's mind, are any thing but clear, conclusive or consistent.

3. The simple question before the Lords is, whether A. B., having gone through such a marriage ceremony as I have just described, was, or was not, from that moment, a "*married*" man. On this question, Lord Cottenham has vacillated, and is still embarrassed. Not meaning the slightest disrespect to his Lordship, it occurs to me, that his vacillation and embarrassment might perhaps have been lessened, or wholly avoided, had he viewed marriage first in its *general* aspect, as an institution common to all Christian states, and then in the *several lights* in which we find it, under different circumstances, regarded by the laws of this country; taking care not to confound what is peculiar to one legal view of marriage, with what belongs exclusively to another; and remembering, after all, that the question, which he had to decide, was not one of conjecture, or hypothesis, or probability, but of plain legal history.

4. The general idea of marriage, it must always be remembered, relates wholly and solely to the married persons. It is a bond of union between one man and one woman, obliging them to treat each other respectively as husband and wife, giving to each a reciprocal right over the person of the other, and precluding both from the indulgence of irregular passion with any other individual. This

bond must be founded on the free and deliberate consent of two competent persons shown by some external act, and must endure for their joint lives, unless sooner terminated by public authority. Such is marriage, viewed as an institution common to all Christian states.

5. But Lord Cottenham observes, in the outset, "that the present inquiry is as to the state of the law (meaning the law of England) as it existed before 1753." From this statement, indeed, he deviates, toward the end of his speech; but for the present, I shall limit myself, as I have elsewhere done, to the time thus fixed by his Lordship. Now, within that period, we find marriage legally spoken of, as spiritual or civil, *de jure* or *de facto*, in right or in possession, clandestine or *in facie ecclesiæ*, valid or null, void or voidable, contracted *per verba de præsenti tempore*, or *per verba de futuro tempore*, dissoluble or indissoluble. I own, I see nothing very difficult to be understood in these distinctions; nor until the present case, could I have supposed that they would have given occasion to any "opposition" between "high names in the history of the law." Lord Cottenham feels a natural repugnance to overrule "Authorities to "which the greatest possible respect is due." If he means such authorities as those of Lord Stowell, or Lord Ellenborough, I hope to satisfy his Lordship that no such necessity exists.

6. The distinction between the *spiritual* and *civil* character of marriage was no doubt felt even by our rude Saxon ancestors; and the feeling had its influence on their laws and customs. But, as Burke well observes, "in "those rude ages, government was not yet fixed upon solid "principles." The laws were indistinct, and their administration variable and uncertain; and whether questions of marriage were treated in the Hall-mote, the Folk-mote, the Hundred Court, or the County Court, or in all these indiscriminately, or in any other manner, it may now be

vain to inquire. Certain it is, that this confusion of spiritual and temporal jurisdiction did not cease till the establishment of the Ecclesiastical Courts in 1085. From that time till 1753, marriage bore, in the law, a twofold character, spiritual and temporal, clearly marked and distinct. In itself, in its essence and substance and verity, it was deemed spiritual, and belonged exclusively to the spiritual jurisdiction; in its apparent form and show, in its results and consequences, as affecting the civil interests of society, it fell under the jurisdiction of the Temporal Courts. I have elsewhere shown how firmly the spiritual jurisdiction was first rooted in the notion that marriage was a *sacrament*. This notion prevailed, and still prevails in the Roman Catholic Church—the Church, be it remembered, to which, for nearly five centuries from the Conquest, all England belonged. The question, therefore, whether marriage existed or not "*de jure*;" the question whether it existed "in right; whether it was "valid," or "null and void;" whether it had been contracted *per verba de præsenti*, or *per verba de futuro;* whether it could or could not be dissolved—all these were questions for the Ecclesiastical Court exclusively, and were so acknowledged and declared to be by the Temporal Courts, which received the decisions of the former, on such points, as *res judicatæ*, unexaminable and conclusive.

7. On the other hand, the Temporal Courts resolutely and firmly maintained their own jurisdiction over matters which were not sacramental or spiritual. It was for them to say what overt acts they held to constitute a marriage *de facto*, or a marriage in possession and common repute, and whether such marriages, or any other not positively declared null, or dissolved by ecclesiastical authority, should give temporal rights either to the married persons or to their issue. Such decisions neither controlled, nor pretended to control, the exercise of the spiritual jurisdiction over the

spiritual questions before specified. But inasmuch as the Temporal Courts had, for their support, the actual power of the state, they could and did prohibit the Spiritual Courts from proceeding on questions purely temporal, or even on some spiritual questions, where, from the death of the parties, there was danger of doing civil injustice.

8. Lastly, it is to be observed, that each description of Courts had its own rules of practice, and its own penalties for contumacy or irregularity: and that both the one and the other admitted in proof certain presumptions *juris et de jure*, which (for the purposes for which they were adduced) were deemed conclusive. If these remarks be kept in mind, the supposed conflicts between the earlier and later authorities will be found to disappear.

9. The noble and learned Peer, whose opinion I am, with all possible respect and deference, examining, says, "the question is, did a contract of marriage *per verba de* "*præsenti tempore*, without the intervention of a priest in "holy orders," (he means a clergyman episcopally ordained) "constitute a valid marriage by the law of this country, "as it existed before the passing of the Marriage Act?" To which I answer, without the slightest hesitation, it most certainly did. Lord Stowell repeatedly said so; and I am ready *jurare in verba magistri*.

10. Lord Cottenham (who is at issue with the Lord Chancellor on this point) thus proceeds:—"in considering "this matter, the first question a lawyer would ask is, what "*decisions* are there to be found, of that period, upon this "subject?" This is very natural: and his Lordship, as a lawyer of great experience, must no doubt mean, what decisions are there of a competent Court on the very point at issue? Decisions of other Courts, on other points, his Lordship well knows, are wholly irrelevant. Now, the noble and learned Peer himself instructs us, that the only competent Courts for such decisions were the Ecclesiastical

Courts; for he says, "the jurisdiction of *all* questions of "marriage has been exercised by the Ecclesiastical Courts "ever since their separation from the Civil Courts, soon "after the Conquest." The word "all" indeed is used rather loosely. The Ecclesiastical Courts had not the jurisdiction of *all* questions of marriage; but they had (and this is what his Lordship must have meant) the exclusive jurisdiction of questions touching the *validity* of marriage, I am therefore entitled to ask, and I do so with great submission, what decision of an Ecclesiastical Court is there to be found, prior to 1753, negativing the precise issue, that a contract of marriage *per verba de præsenti tempore*, without the intervention of a clergyman episcopally ordained, constituted a valid marriage? Lord Cottenham says, "there are *many* decisions" to that effect. But, I ask again, are they decisions of a competent Court? are they decisions of an Ecclesiastical Court? His Lordship has not mentioned *one*. And I am bound to add that in forty years' acquaintance with the ecclesiastical jurisprudence of this country, I never met with, nor heard of, such a decision.

11. One word more, on this point. The learned persons who lay it down, that by the law of England, prior to 1753, there could be no valid marriage contracted without the presence and intervention of an episcopally ordained clergyman, have not shown, and, I humbly apprehend, cannot show, that that rule is to be found *totidem verbis*, in the whole history of the law.

12. On the other hand, we have the high authority of the Lord Chancellor, who says, in this very case of *The Queen* v. *Millis*, that "the Spiritual Courts were the sole "judges of the lawfulness of marriage, where that question "was directly in issue;" and who after quoting the ecclesiastical authorities, and showing that they "are confirmed by "common law authorities of the most respected and highest "character," thus concludes: "that a contract *per verba*

" *de præsenti* was, at the period to which we are referring, " considered to be a MARRIAGE; that it was, in respect of " its constituting the substance, and forming the indisso- " luble knot of matrimony, regarded as *verum matrimonium*, " and was followed by such incidents as I have mentioned, " is, I apprehend, clear beyond all controversy." So far, therefore, the Lord Chancellor differs *toto cœlo* from Lord Cottenham. I shall presently follow out these differences more in detail.

13. Lord Cottenham, admitting that " the law of the " Ecclesiastical Courts," as to the validity of marriage, " must have been at all times the law of the country;" but apparently forgetting that he had just pointed to the *decisions* of a Court, as the best evidence of the law by which it is guided; or else being unable to discover any such evidence in the present instance, produces in its stead—what? The law of King *Eadmund*, and the ordinance of Archbishop *Lanfranc!* These rude fragments of obsolete legislation were passed over by the Lord Chancellor with silent contempt. It may have evinced very meritorious industry, in the learned counsel, to disinter such documents from the dust of ages; nor is it perhaps surprising, that judges of the Common Law should have taken them, *primâ facie*, to be of weight in the Ecclesiastical forum; but after their utter insignificance, in this respect, had been demonstrated, in the letter to Lord Brougham, I confess I was somewhat surprised to find Lord Cottenham not only referring to them as laws of the Church, which had never been altered, but building on them the main fabric of his following argument.

14. Respect for the noble and learned peer, however, will not permit me to pass over authorities which he has offered for the guidance of the House of Lords. And first as to the law of King Eadmund, passed, it appears, in the year 940, I would humbly ask, Whether this is the only

Saxon law, which continued *in viridi observantiâ* till 1753; or are we to add to the Statutes at Large the whole mass of Saxon legislation, or to make a selection from it; and if so, upon what principle? King Ina imposed on a man, who suffered his child to die unbaptized, the forfeiture of all his goods. King Alfred denounced against certain assaults the *lex talionis*, and established a graduated scale of fines for criminal conversation, according to the rank of the parties. This very King Eadmund, in the same law which directed a mass priest to bless a marriage, directed also the married parties to give security for their good conjugal behaviour. Did all or any of these enactments remain in force till the middle of the last century? If they did, it seems somewhat strange that they are never cited as authorities in any of the volumes of the law: and as to King Eadmund's law I have elsewhere shown, that it did not profess to annul a marriage contracted without the sacerdotal benediction; it did not even prohibit such marriages, but simply recommended a more formal ceremony.

15. Next, as to Lanfranc's ordinance, passed at a Council said to have been held at Winchester in 1076, Lord Cottenham sees no reason to doubt its authenticity, and it may possibly be authentic. The very existence indeed of such a Council is not mentioned by William of Malmesbury, who gives a long and minute account of the Council of London in 1075. Spelman, however, has furnished three extracts from writers who mention it; the two more ancient omit the provision in question altogether, but the third (apparently a German writer of the year 1605) contains the short passage quoted by Lord Cottenham. I had occasion to notice, that in Johnson's Collection it is mistranslated; and I regret to perceive that his Lordship (no doubt from inadvertence) adopts the mistranslation, instead of the original. The English word "fornication" might give some colour to the inference sought to be established

by Lord Cottenham; the original Latin "conjugium"—"fornicatorium" would have altogether excluded it. (See Letter to Lord Brougham, p. 15.)

16. The answer of Lord Denman to the argument built on these ordinances is conclusive, and I wonder that Lord Cottenham did not attempt to grapple with it, instead of merely asserting that the ordinances had not been altered. "Supposing" (says Lord Denman) "that Lanfranc issued "a Constitution, in the eleventh century, for annulling all "marriages not contracted in the presence of a priest, did "that become, and did it continue, the law of England in "the face of those *Decretals* of Pope Gregory mentioned "yesterday in the argument of my noble and learned "friend (Lord Brougham)?" The purport of those Decretals was very fully set forth in the Letter to Lord Brougham (p. 16, et seq.) and it was there shown,

1. That the Decretals were directly contrary to the supposed effect of these laws of Edmund and Lanfranc.
2. That the Decretals were binding on all ecclesiastical judges in England, as to the validity of marriage.
3. That Archbishop Arundel, in 1408, whose authority was exactly the same as that of Lanfranc, strictly prohibited the observance of any rule concerning matrimony contrary to the Decretals.

I have elsewhere said, that Lanfranc himself would not have presumed to oppose, on this subject, the doctrines of the Roman Church. His own words, addressed to the Council of 1072, are express and pointed: "Ipsa (Romana "Ecclesia) est major omnium ecclesiarum, et quod in eâ "valet, debet et valere in omnibus."—"Cantia subjicitur "Romæ."

17. The Decretal of Pope Gregory IX. (L. 4, T. 1, c. 31), cited by Lord Brougham, is clear and unequivocal. It supposes a man and a woman to take each other as hus-

band and wife, in words of present time, without any other ceremony. It supposes one of them afterwards to marry a third person. It calls the latter union a *second marriage*, and the former a *first marriage;* and it decrees, that the first marriage must remain in its firmness, and that the second marriage contracted in fact only (but not in right) must be dissolved. Nor is this a solitary passage in the Canon Law. Textual authorities from St. Augustine, St. Ambrose, and Popes Nicholas, Alexander III., and Innocent III. have been cited, to the like effect; and to these have been added numerous Glosses, &c. proving the universal understanding of the Canonists, that a present consent alone constituted a marriage: and, lastly, it has been shown, that this doctrine rested on an article of faith, received as such for ages in England, that marriage was a *Sacrament.* These considerations show, that it was *morally impossible* that, from the middle of the thirteenth century to the Reformation, the laws of Catholic England, as to the constitution of a valid marriage, could "differ" (as Lord Cottenham supposes them to have done) "from the Canon Law" received in all other parts of Catholic Europe. After the Reformation, the Lord Chancellor has clearly proved, from Swinburne, Lord Stowell, Sir Edward Simpson, Dr. Ayliffe, Lord Holt, Mr. Justice Blackstone, &c. that a contract *per verba de præsenti* continued, till 1753, to be held a marriage.

18. On this point, Lord Cottenham is at issue with the Lord Chancellor; because he thinks, first, that the ordinances of Edmund and Lanfranc "had been adopted by "the laws of this country, and so become part of this law;" and, secondly, "that the *decisions* of the Civil and Ecclesi- "astical Courts were in conformity with the directions con- "tained in those ordinances." I have disposed of the first ground, and have now to examine the other.

19. "In order to judge of the weight and importance of

" these decisions," says the noble and learned peer, " it is " proper to consider by what *tests* the validity of a marriage " is to be tried." Nothing can be more judicious. Let us see then what those tests are. The validity of a marriage, as his Lordship has accurately stated, could only be tried, during the period of which he is speaking, in the Ecclesiastical Court. The tests therefore could be only such as that Court could properly estimate. Lord Cottenham enumerates five circumstances, which he considers as tests— 1. " To give to a woman the right of a wife in respect to " dower."—2. " To give to the man the right of a husband " in the property of his wife."—3. " To give to the issue " the right of legitimacy."—4. " To impose upon the " woman the incapacities of coverture."—and 5. " To make " the marriage of either of the parties, living the other, with " a third person, void." Now, with all possible respect for his Lordship, I would presume to suggest, that so far as these circumstances relate to rights purely civil, which the first and third do exclusively, they could be no tests at all in the Ecclesiastical Court. Dower and legitimacy not only could not serve that Court as tests of the right of marriage; but if it had presumed to enter on the examination of either of them, it would have been instantly stopped by prohibition. I must repeat what I have above said of the general idea of marriage. That idea relates solely to the bond of union between the married persons. " Con- " sistit essentia matrimonii in vinculo illo, quo formaliter " sunt conjuges uniti."—(Sanchez, ii. 1, 6.) Then comes in the law of England, and says (or at least did say) the bond is of a highly *spiritual*, as well as civil, nature; and therefore its actual existence and validity must be judged in the Spiritual Court; but that Court has no right, and no power, to judge of the purely *civil* incidents and consequences of marriage. " Rights of property" (says Lord Stowell, with his usual point and precision) " have nothing

" to do with marriage, considered as to the *vinculum*." (1 Hag. 236.)

20. I proceed, with great deference, to examine the first test suggested by Lord Cottenham. "A contract *per verba de* " *præsenti*" (says his Lordship) " did not give to the woman " the right of a wife, in respect to *dower*." This is somewhat too largely expressed. I admit indeed that it did not directly confer that right, nor always indirectly. But then I would very respectfully ask, *quid ad rem?* The validity of marriage was a spiritual question; dower was a civil incident. Let us consider them separately. If the validity of a marriage had been in any manner brought into dispute in the Ecclesiastical Court, an allegation that the woman had no right to dower must have been rejected, as totally foreign, not only to the question at issue, but to the jurisdiction of the Court. Suppose the temporal law had given no dower at all, or given it only to women married within the age of child-bearing, or to those married on a Sunday, or to noble ladies, or under any other conceivable qualification, how could that have affected the validity of these marriages by the spiritual law? It is not pretended, that any sentence of an Ecclesiastical Court turned on a right of dower; nor, on the other hand, can it be shown, I apprehend, that any Temporal Court, in deciding for or against a claim of dower, gave judgment, as of its own authority, on the validity of the marriage *de jure*.

21. On the other hand, if a right of dower came into controversy at Common Law, there seem to have been two ways of treating it, according as a marriage was, or was not, admitted to have taken place. If the fact of marriage was disputed, an issue of " marriage or no marriage" went to a jury. If the legal effect alone was in question, the issue *unques accouple in loial matrimony* went to the bishop. When a man and woman were married at the church-door (which appears from Chaucer to have been the custom in

his days), the fact could not but be within the knowledge of the vicinage; and indeed it seems that at some periods of legal history, a less degree of publicity was thought sufficient; for instance, if the parties were married in a chapel, or a chamber. Be this as it may, when once a fact of marriage was established, with such evidence of publicity as the Common Law Court held conclusive, that Court presumed the marriage to be valid, until dissolved by ecclesiastical authority; for the maxim *ubi matrimonium ibi dos*, was held (in favour of dower) to be satisfied by a public marriage *de facto*, unimpeached. Consequently, on an issue before a jury, it would have been nugatory to plead that the marriage was invalid, for reasons of which the jurors could be no judges, such as consanguinity, affinity, precontract, religious yows and the like. Indeed, even proof of a celebration of any kind was, for some purposes in the Common Law, unnecessary: the apparent *status* of husband and wife, that is, marriage "in possession," from cohabitation and repute, was enough. And, again, under certain circumstances, a marriage merely *inchoate*, and which never could become valid, sufficed to give a right to dower; as did a *voidable* marriage, until avoided, although it might have been contracted in flagrant contempt of the laws of the Church. On the other hand, some marriages, of the validity of which there could be no question in the Ecclesiastical Court, gave no right to dower, the marriage, for instance, of an alien. When the issue, "unques accouple "in loial matrimony," went to the bishop, he tried the validity of the marriage, as he would any other, by the Canon Law,—common, on this subject, to England with the rest of the Catholic world; by which a consent *de præsenti* was very matrimony; and if he certified it to be such, even though he added, "*sed clandestinum*," his certificate was conclusive, and dower was given. From all these considerations, I humbly conceive it to be quite clear, that the

giving or withholding of dower afforded no test of the validity or invalidity of a marriage.

22. I have elsewhere fully considered the case from Coke Littleton, 33 a. It contained (and this was about the year 1280)—

1. An unimpeached sentence of a competent Ecclesiastical Court, *affirming the validity* of a marriage contracted between A. and B., *per verba de præsenti.*
2. Two sentences of Common Law Courts, the first granting, but the second, on appeal, refusing *dower* to B. out of lands which A. had alienated, after marriage, and before its solemnization *in facie ecclesiæ.*

It is somewhat remarkable, that Lord Cottenham makes no observation on the first of these sentences, which is direct to the point, but argues on the two latter, which can only affect it inferentially. There is no conflict between the spiritual and either of the temporal sentences; and if there were, the spiritual sentence must clearly prevail, as to the *validity* of the marriage. Lord Hale's note, that the contract was not a marriage, may probably have meant, as the Lord Chancellor suggests, "not such a complete marriage "as to give a right to *dower.*" Lord Cottenham says, the Common Law judgment "assumes that the contract was "not a marriage." Why so, any more than if dower had been refused because the woman was an alien? In that case, the marriage might have been unquestionably valid, and yet dower would not have been given.

23. Lord Cottenham's second test of the validity of marriage relates to the *husband.* "A contract *per verba de* "*præsenti* (says the noble and learned peer) did not give to "the man the right of a *husband* in the property of the "woman." Still, I say, this is *nihil ad vinculum.* A husband, being an alien, shall not be tenant by the curtesy;

does this prove that he never was married? His lordship relies chiefly on the case of *Haydon* v. *Gould*, which has been concisely summed up by the Lord Chancellor, as "an "instance of the *civil* effects of a regular marriage being "withheld from a contract *per verba de præsenti* not duly "solemnized according to the rules of the Ecclesiastical "Law." This is in accordance with what I have elsewhere stated, and manifestly proves nothing whatever, as to the validity of the marriage bond. Lord Cottenham assumes the decision to have been, "that what had taken place be-"tween the parties" (namely a marriage ceremony in a dissenting congregation) "did not constitute *a marriage*." Nobody knows better than the noble and learned peer the great risk there is in varying the terms of a judgment. He will therefore, I trust, excuse me for observing, that there could not be, in the case in question, any such decision as he supposes; for the validity of the marriage was not put in issue, but merely its regularity. The decision was simply to revoke the administration; and the ground of the revocation was not that the ceremony in question was *no* marriage, but that it was not *such* a marriage as entitled *the man* to demand, in an Ecclesiastical Court, an office, in its origin ecclesiastical; he having contracted the marriage irregularly, in contempt of the Ecclesiastical Law. "Frus-"trà ecclesiæ auxilium implorat, qui ejus contempserit "authoritatem." (*Sanchez*, iii. 42, 2.) At the same time, though the man himself was barred from his claim, *personali exceptione*, it seems to have been admitted that the ceremony constituted such a marriage as would have entitled the wife and children, in a Temporal Court, to temporal rights. I find this view of the case confirmed by the opinion of the late Mr. Justice Holroyd; and certainly the decision does not in the slightest degree shake the doctrine unanswerably proved by the Lord Chancellor to have been held for centuries by the Ecclesiastical Tribunals, and

" confirmed by the Common Law authorities," that a mutual consent *de præsenti* was very matrimony.

24. The Statute of Distributions could not alter the case; since it only allowed a husband to take administration, "as he might have done before the making of the "act:" and doubtless, the principle just cited from Sanchez would have operated as much to exclude him before the act, as it did afterwards.

25. The expressions of Perkins, that the woman is not a wife, and that they are not one person in law, whether he alludes to a contract de præsenti or de futuro, can only be taken *referendo* to the particular civil incidents, of which he is treating, and with which, as a common lawyer, he was conversant.

26. When Lord Cottenham, from premises so inconclusive, infers, " that by the law, common as well as ecclesias "tical, a contract *per verba de præsenti* did not establish "the relation of *husband* and *wife* between the parties," he probably overlooks the difference, in legal signification, between the appropriate terms *maritus* and *uxor*, on the one hand, and *baron* and *feme* on the other. The former are husband and wife *de jure* in the Spiritual Courts; the latter are husband and wife *de facto* in the Temporal Courts. Dr. Goldingham is represented as saying in Bunting's case (Moore, 170), "en construccion del Civil Ley, la feme est "*uxor* devant les espousals"—that is, *de jure*. Whilst on the other hand, Rolle quotes from 9 Hen. VI. 34. "Si "home espouse son *mere*, ils sont *baron* et *feme*, tanque "soit defete."—That surely can only be *de facto*.

27. I approach an objection to the validity of a marriage contract, which appears, on the first blush, to be more weighty than the preceding. "Thirdly" (says Lord Cottenham) "a contract *per verba de præsenti*, between a man "and a woman, did not confer upon their issue the right of "*legitimacy*." I humbly conceive, that the proposition of

the noble and learned Peer is somewhat too largely expressed. There were many cases, in which those rights *were* derived from such a contract. Still I admit, that it may reasonably excite surprise to learn, that in any case, a man and woman should be indissolubly united, *de jure*, in the bonds of marriage; and yet that their issue, the *natural* result of that union, procreated and born after its constitution, should not be deemed legitimate! An examination into the early history of our law will solve this enigma. And after all, it must be remembered, that legitimacy is the creature of civil institutions, varying as they vary. It is a civil incident, and therefore no test of a spiritual question. The Ecclesiastical Courts of England had exclusive jurisdiction to try the validity of a marriage, they had no jurisdiction at all to try the legitimacy of children.

28. At a very early period, the Popes endeavoured to bring the legitimacy of issue, in England, under ecclesiastical cognizance; but they were promptly met, and obliged to recede from that pretension. In the twelfth century, as we learn from various glosses to the Decretals (i. 29, 17; iv. 17, 4; and iv. 17, 7), there lived in England two brothers, named Ralph and Francis. Ralph had by Anelina a daughter named Agatha, who married and had a son named Ralph. Ralph, the grandfather, went to the Holy Wars, leaving Agatha and her son in possession of his lands. The grandfather died beyond sea, and Francis entered upon the lands by force, alleging that Agatha was not the legitimate daughter of his brother, but was born whilst Anelina had a husband living, named Alan. Ralph, the grandson, hereupon applied to the Pope (Alexander III.) for a commission to Bishops to examine into the legitimacy of Agatha, in order to obtain repossession of the lands; and accordingly the Pope issued a commission to the Bishops of London, Exeter and Winchester, for this pur-

pose, directing them first to replace Agatha in temporary possession of the lands, from which she had been ejected. King Henry II., looking on this as an attempt of the Pope to usurp a temporal jurisdiction in England, opposed the execution of the commission; whereupon the Pope revoked the first commission; and issued another to the same Bishops, declaring that causes of temporal possession belonged to the King, but ordering the Bishops to take cognizance of and determine the question, whether Agatha was or was not born in lawful *matrimony*.

29. From this case, which occurred between 1160 and 1180, and from the Statute of Merton, which was in 1235, it is clear, that the Ecclesiastical Judges could neither examine into, nor give any opinion on a question of legitimacy (at least amongst the laity), and that if they had tendered any such opinion to the Common Law Courts, it would have been treated with disdain. The parts of the Canon Law, which relate to legitimacy, being manifest invasions of the temporal authority, were never received in England by the laity, and could not on religious grounds bind the consciences of any judges, ecclesiastical or temporal, except in questions relating to church discipline, such as fitness for orders, for ecclesiastical preferments, and the like. Accordingly, in other matters, it is not pretended that any spiritual judge ever pronounced directly on the legitimacy of any person. They were required to certify, and did certify whether the parents were *married*; but the effect of such certificates on the legitimacy was left entirely to the temporal jurisdiction.

30. Again, it depended wholly on the Temporal Courts, whether they would require certificates or not, and if not required by them, the spiritual judges could not move in the matter. As in dower, so in bastardy, many questions, not involving the validity of marriage, went to a jury. Much has been said of the early cases of *Foxcroft* and

*Del Heith* (1281 and 1305), in which the sons were held bastards, though the parents had contracted *per verba de præsenti:* and Lord Cottenham states, that in each "the "marriage was held invalid." With very great submission, I must beg leave to doubt whether his Lordship's usual accuracy has not failed him here. In the accounts of these cases, that I have met with, nothing is said about the invalidity of the marriages: the issue indeed were found bastards; but to contend that that proves the marriages to have been invalid is a mere *petitio principii.* It has been surmised, that Foxcroft's case was on a certificate of the ordinary; but if so, the ordinary may have found the contract *de præsenti* not proved. However, Del Heith's case was certainly before a jury, and the probability (I think) is that they both were so: but the jurors most assuredly could not tell whether the marriages were valid or not; for that was a spiritual question, with which neither they nor the judges of the assize could be supposed to be conversant. Though words *de præsenti* may have been used, it was for the Spiritual Court to say whether or not they had been so used as to form the *vinculum* of marriage. They might have been resolved, *per adjectionem,* into a mere promise *de futuro* (Sanch. i. 18, 11); they might have been used by incompetent persons; or, as Lord Campbell has well shown, the *animus contrahendi matrimonium* might have been wanting. For all these, and a thousand other circumstances affecting the matrimonial *vinculum* favourably or unfavourably, the books of the canon law were replete with rules, to the lay tribunals absolutely unknown.

31. The information, that we possess, of the cases of Foxcroft and Del Heith, is but scanty, and indeed what a learned gentleman, in a recent Treatise on Bills of Discovery, has said of the early Reports relating to that subject, may be pretty generally applied to all the English Reports of an-

cient date,—" the very scanty information afforded by them " renders it necessary to observe great caution in resorting " to them as authorities." In the *Year Books* there is a notable confusion between the arguments of counsel and the dicta and decisions of judges; and in *Rolle* and other compendiums, they are frequently set down alike as law. The case of *Bunting* has two different aspects as reported by Coke and Moore; and in the latter it is not easy to disentangle the alleged doctrines of the Canon Law (which he mistakenly calls le Civil Ley) from those of the Common Law. *Collins* v. *Jessot* is reported in Salkeld, Modern, Gibson, and twice over in Holt, and in no two alike. The reports of *Haydon* v. *Gould* are very confused: and yet it is chiefly on the supposed construction of these cases, and of a loose and equivocal note of my Lord Hale's, that it has been thought proper to disturb the law long regarded as clear and settled—" to overrule authorities to which the " greatest possible respect is due,"—and particularly to controvert the ecclesiastical doctrine of one, whom the Lord Chancellor has justly designated " the most learned eccle- " siastical lawyer of his age."

32. But to return to the cases of Foxcroft and Del Heith,—I have elsewhere considered them, on the supposition of an issue being sent to the ordinary; but supposing a different course to have been taken, it must have been thus: A man who has had an illicit connexion with a woman, falling ill, is induced to go through the marriage ceremony with her, with the intervention of a clergyman, privately in a chamber, and does not afterwards marry her publicly in the face of the Church. He some time subsequently dies, leaving by her a son, who enters on his father's lands. An ejectment is brought, and the adverse party alleges, not that the father and mother were never married, or that the marriage between them was invalid;

because an issue must then have gone to the ordinary, who might probably have found the marriage valid; but he alleges, "quòd natus fuit antequam pater suus matrem suam "desponsavit," which (says Fleta) is one of those causes of bastardy "quarum cognitio ad Curiam Christianitatis "non est demandanda" (vi. 39, 4), and *that* necessarily, by the Statute of Merton. Now upon this issue, what were the jury to do? They knew nothing of the word "desponsavit," but that it implied a marriage in *fact.* Suppose the son had proved, that prior to his birth his parents had been married at the church door; the marriage might have been one wholly invalid by the law of the only Court competent to determine its validity; but still the jury must have found the son legitimate. Suppose the son, on the contrary, had alleged nothing but a mere contract *per verba de præsenti;* this might have been quite sufficient to prove a marriage *de jure* in a Spiritual Court; but a jury, uninstructed by the judgment of such a Court, could not take it as proving a fact of marriage. A middle case presents itself: there is a contract *de præsenti,* a ritual ceremony, a ring, a minister in episcopal orders; but the proceeding is not had, strictly speaking, in the face of the Church; it is in a private chamber; the man is on his sick-bed, and (what seems much dwelt upon) there is *no mass.* Had it been clear law, at that time, that nothing short of espousals in the face of the Church would have legitimated the issue, there would have been no necessity for any of these details. As the case stood, however, the Court may have directed the jury, that *under all the circumstances* there was not sufficient proof of a *fact* of marriage, either because the man was *in lecto mortali,* or for other reasons. If on the other hand they ruled, that without a solemnization *in facie ecclesiæ* there could be no proof of a marriage *de facto,* they differed from many subsequent authorities; and at all events gave no countenance to the recently sug-

gested rule, that the validity of marriage depend ed on the presence of an episcopally ordained minister; for the ceremony was performed in one of the two cases by a priest, and in the other by a bishop!

33. The next case adverted to is *Bunting's* (4 Coke, 29 a, and Moore, 169). Lord Stowell relies on it to prove the contract a marriage, and so recognized by the Common Law Courts; Lord Cottenham relies on it to prove the very contrary. I have to inquire, with great respect for both these noble and learned peers, which of them is in the right. Agnes Addishall contracted with John Bunting, and afterwards married Thomas Twede. The Ecclesiastical Court compelled her to leave Twede and return to Bunting. So far, this is the very case of the Decretal of Gregory IX., cited by Lord Brougham; and therefore it proves two things; 1st, that that Decretal was part of the Canon Law received in England after, as well as before, the Reformation; and 2ndly, that under that law, a contract *per verba de præsenti* was held, by the competent, and only competent Court, to be a marriage; for surely no Court would have compelled a woman to leave a man whom she *had married* in order to live in adultery with a man whom she had *not married.* The ecclesiastical judge said to her, in substance, "You are married to Bunting; but "you contracted that matrimony irregularly; go, and purge "that irregularity by a public solemnization, and then re-"turn to your lawful husband Bunting. Your marriage "with Twede was from the first essentially null and void; "and we now formally pronounce it so to have been." And all this they did, without so much as citing Twede to be present at any part of the proceedings. Agnes accordingly solemnized her marriage publicly with Bunting, and had a son by him named Charles. The *vinculum* of marriage then existed: let us look to the civil incident of legitimacy, which was determined about thirty years afterwards.

34. Charles Bunting had entered on a copyhold, as lawful son of John and Agnes. One Lepingwell re-entered, and thereupon Charles brought an action of trespass against him. There was a special verdict embracing several points, the first of which was whether Charles was legitimate. If the Common Law Court had held that the contract was *not* a marriage, it must at once have pronounced him illegitimate, not without some indignation at the spiritual authorities, who, upon that hypothesis, would have forcibly driven Twede's wife into adultery. On the contrary, it eventually held him legitimate; but at first doubted whether Twede should not have been made a party to the proceedings in the Spiritual Court. On this point, and on this alone, they heard Dr. Goldingham, an ecclesiastical lawyer. He said, "that "Agnes having first contracted with Bunting, was his *wife*, "by the spiritual law; that if they had sexual intercourse "after the contract, and before a public solemnization, they "could not have been punished, as for adultery, or fornica- "tion, but only as for a contempt of a particular edict of the "Church, which prohibits such intercourse until the married "parties have been regularly joined together in the face of "the congregation; that if a legacy had been bequeathed "to Agnes, to be paid to her '*cùm uxor fuerit*,' she would "have been entitled to demand it in the Spiritual Court "before public solemnization; because, in construction of "the ecclesiastical law, a woman contracted *de præsenti* "immediately becomes *uxor;* and if, after the contract "and before solemnization, she marry a third person, such "latter marriage is *void;* for from the time of the contract "she is disabled from contracting with, or marrying any "other man." All this is perfectly consistent with the canon law of England, as laid down by Swinburne, a contemporary writer; and it moreover connects naturally with the point which Dr. Goldingham had to prove, viz. that Twede's marriage, being contracted with an incapable per-

son, required no formal divorce, and consequently no citation of him to appear and see proceedings.

35. But according to Moore (for Coke takes no notice of the Doctor, or his argument) this learned ecclesiastical advocate travelled into matter quite out of his sphere, and entirely beside the point which he was called upon to explain, and read the Court a lecture on the civil incidents of legitimacy. The Court did not send for him to know what the law of legitimacy was. What it might be by the canon law concerned them not; for on that subject the canon law was not allowed in England, except to churchmen; and what it was by the law of the land, they themselves knew much better than he could inform them. It is clear, therefore, that Moore has mixed up Dr. Goldingham's argument with that of some other person, perhaps a member of the common law bar, who may have contended, that a child born after a contract would be legitimate if a public solemnization followed the contract, and illegitimate if it did not. Upon what system this is, or ever was law, *non constat;* and we have nothing for it but the *ex parte* statement of an uncertain advocate. True, it seems to be adopted as part of the laws of England, in Comyn's Digest; but that circumstance only confirms what I have said of the loose grounds on which passages in such compendiums often rest; for Comyn cites no other authority for so very peculiar a doctrine, than this supposed argument of an ecclesiastical lawyer.

36. The Court of Queen's Bench, in giving judgment for Charles Bunting's legitimacy, said nothing about solemnization either before or after his birth; but this they did say expressly, "that the cognizance of the *right of marriage* "belonged to the Ecclesiastical Court; that that Court "having given a *sentence* in the cause in question, the judges "of the common law ought to give faith and credit to it, "and to think it consonant to the law of Holy Church,

" even though it should be against the reason of their own " law, and that they had always done so, as appeared from " a case of the reign of Henry VI." Here then we have the Common Law Court distinctly recognizing a sentence, which had found a contract *de præsenti* a marriage. And so much for " the authorities," which, as Lord Cottenham conceives, " *establish* his third position!"

*37.* " Fourthly," says his Lordship, " a contract *per verba* " *de præsenti* did not impose upon a woman the incapacities " of *coverture.*" With great deference, I submit, that this proposition also is somewhat too largely stated. Incapacities immediately connected with the bond of marriage, and cognizable in the Spiritual Court, it certainly did impose on her. She was disabled from legally contracting with a third person either espousals (properly so called) *de futuro,* or marriage. And as she was authorized to take a legacy bequeathed to her *cùm uxor fuerit,* she must by parity of reason have been incapacitated from taking one bequeathed *nisi uxor fuerit.* With regard to certain incapacities imposed by the common law alone, the case was different, because in those instances it might have been necessary to show a marriage *de facto,* or in possession, neither of which might have followed the contract. Perkins cites a case of the year 1364, to show, that after a contract, by which he may possibly have meant a contract *de præsenti,* a woman was not incapacitated from enfeoffing or being enfeoffed by the man to whom she was contracted, nor from disposing of her property by will. Bracton seems to hold the contrary, as to the feoffment; and cites for it the case of Eudo and Helewisa in 1230. Now there would be nothing wonderful in the law's having undergone a change between 1230 and 1364; but it would be strange that Bracton should have used the words " fides data" for any thing but a contract *de præsenti,* contrary to the well known use of the words in his day. I would submit, however, whether

the discordance (if any exist) might not be thus reconciled: in the case of Eudo and Helewisa the question whether Helewisa was to be considered as "married," at the time of the donation made to her, may have been sent to the ordinary, who must necessarily have certified that she was married *de jure;* whereas in the case mentioned by Perkins the question may have gone to a jury, who would probably consider a mere contract, whether *per verba de præsenti* or *de futuro,* as not sufficient proof of a marriage *de facto.* And once more I must repeat, that this was a right of property, and the decision on it by a lay tribunal could not affect the marriage vinculum.

38. "Fifthly," says Lord Cottenham, "a contract of marriage *per verba de præsenti* did not make the marriage of one of the parties, living the other, with a third person, *void.*" The argument, I presume, is meant to be this: The marriage with the third person is merely *voidable;* until actually avoided, by the sentence of a competent Court, it is a good and valid marriage, with all the incidents of the most complete and perfect marriage that can be constituted—dower, thirds, legitimacy, &c. &c.; but as there cannot be two co-existent marriages of the same person both good, it follows, that until the second is avoided, which may never happen, the first is no marriage at all. It is obvious, that this argument may be met by one at least as specious. It may be said, if a marriage be dissolved by reason of a precontract, it must be on the ground that the precontract disabled the parties to it from consenting to marriage with any other person; but a marriage without a consent wants an element essential to its validity; therefore the dissolved marriage was in reality no marriage at all: it was not merely voidable, but *void,* and the objection of two co-existent marriages entirely fails.

39. Such is the difficulty—the solution is simple: it consists in the proper application of the equivocal word

" voidable." A voidable marriage is not a marriage capable of being *made* void, but one capable of being *declared* void. Whether a marriage, as to its essence, (that is to say, the vinculum), was actually valid or void, was, at the time to which the argument relates, a question for the Spiritual Court alone. The Spiritual Court held (as has been over and over again demonstrated, and particularly by the Lord Chancellor) that a contract *per verba de præsenti* was a valid marriage; that the vinculum existed *eo instanti* between the parties; that it was not, (as Lord Brougham unanswerably showed), a contract *executory* to do something thereafter, but an actual doing of the thing itself—a knitting together of the indissoluble bond. " How can " it be made more lasting," (said he), " than by being per- " petual? How can it be made more firm, than by being " placed beyond the power of the parties, and of all man- " kind? How can it be made more binding, than by being " wholly indissoluble?"

40. If, then, a marriage was formed—if the joint efforts of both parties were powerless, without a crime, to dissolve it, could one party alone do what both together could not? Could the man, for instance, blot out, from the eternal records,

" —— that great vow,
Which did incorporate, and make them one?"

Could he do this by a crime, a fraud, a profanation, a perjury, an adultery?—by taking God to witness at the altar, that he would be a husband to one woman, when he knew himself the husband of another? No! By the Ecclesiastical Law, the contract *de præsenti* was not an *impedimentum impediens* to a second marriage, rendering it merely irregular; but an *impedimentum dirimens*, so called, say the books, " Non quasi matrimonium verum dirimat, sed quia " matrimonium de facto non de jure initum reddat inva- " lidum." Therefore, in Bunting's case, the Court of

Queen's Bench, in its judgment, called Twede a husband *de facto;* and the Ecclesiastical Record of the fourteenth century, quoted by the Lord Chancellor, called the marriage with Alicia a marriage *de facto*, and pronounced it, (by reason of the precontract with Cecilia), "*fuisse* et esse "invalidum." "This," as the Lord Chancellor justly observed, "was agreeable to the rule of the Ecclesiastical "Courts:" and "the law of those Courts," as Lord Cottenham candidly admits, "must have been at all times the law of the country."

41. Among the *impedimenta dirimentia* rendering a *de facto* marriage void, was the *impedimentum ligaminis*, defined to be "vinculum prioris matrimonii, quo durante, "posterius est irritum;" (Sanchez, vii. 80, 1.) It was by force of this impediment, that second marriages, during the existence of a precontract *de præsenti*, were pronounced to have been, from the moment of their constitution, null and void. This was implied even by the statute 32 Hen. VIII. c. 38, where the precontract was followed by consummation; others more consistently held consummation unnecessary, but all agreed (with this limitation) that a precontract *de præsenti*, and a solemn public marriage, were equally *impedimenta ligaminis* to a second connubial tie. It was not the action at law founded on a *ligamen*, which formed the impediment, rendering the second marriage void; it was the *ligamen* itself. All the *impedimenta dirimentia*, including consanguinity, affinity, precontract, and several others, were, in this view, of like efficacy. Consanguinity, or affinity within the prohibited degrees, was neither more nor less operative as an impediment disabling the parties from marrying a third person, than a precontract or public marriage was. Now the 99th Canon (of 1603) in speaking of marriages contracted within the prohibited degrees, expressly enjoins, that they be dissolved "ut *ab initio* vacua

" sive nulla;" just as Alicia's marriage above-mentioned was pronounced "*fuisse* et esse invalidum."

42. But then, it may be asked, what was the difference between a *void*, and a *voidable* marriage; and what need was there of an action at law to annul that which was already a nullity? I answer, first, as to the Ecclesiastical Court; there, as in other tribunals, the maxim prevailed "*De non apparentibus et non existentibus eadem est ratio.*" Whoever alleged a marriage to be null, by reason of any impediment, was bound to prove the impediment. If the impediment was a prior marriage, it must have been proved valid *de jure*, whether it was contracted publicly or privately; but a public marriage might not always be proveable by satisfactory evidence; much less one that was private and clandestine. " Pro clandestinâ desponsatione non " præsumitur, sed illud alleganti incumbit onus probandi." (Decret. iv. 3, 1.)

43. Next as to the Temporal Courts:—They could not listen to any proof of the existence *de jure* of an alleged prior marriage, until it had been established in the Ecclesiastical Court. On the other hand, the second marriage, contracted with all due solemnity, and every external appearance of validity, was generally to be presumed by a temporal judge to be valid, and was to be treated as such; but always with the limitation " tanque soit defete" (until declared void by the ecclesiastical authority): and as the Temporal Courts prohibited the Spiritual from exercising such power of defeasance after the death of either of the parties, a second marriage, even though intrinsically vicious, must then have been treated at Common Law as good, and as carrying those civil consequences which belong to validity; whilst the marriage essentially good, but incapable of being proved so, was necessarily deprived of them all.

44. To the general presumption in favour of marriages publicly solemnized, there were indeed exceptions; but

these were where the impediment to their validity was of a nature of which a jury was competent to judge; as, for instance, a prior marriage solemnized with equal publicity: for in such a case the presumption would have been in favour of the first marriage; and unless that could be defeated in a Spiritual Court, the second must of course have been held null. So the Temporal Courts could judge of nullities from defect of age, of reason, or the like, without resorting for aid to the Ecclesiastical Tribunals. Still this was only for civil purposes, and not where the validity of the marriage *de jure* was put in issue; for, in that case, as Lord Cottenham justly observes, "The Civil Courts could "not have had any rules, but those which they received "from the ecclesiastical authorities."

45. The noble and learned Peer is speaking of the time prior to the Marriage Act of 1753; for that act, by creating statutable nullities, gave to the Civil Courts thenceforward rules of their own for determining on the validity of certain marriages. Now, it must be remembered, that when Blackstone lays down the distinction between *void* and *voidable* marriages, he is speaking of the law as it stood *after* 1753: and moreover, that he there refers to marriage in its civil character only. "*Our* law," says he (meaning the temporal, in opposition to the Spiritual Law), "considers "marriage in no other light than as a *civil* contract." It is in this view that he divides the personal disabilities to contract marriage into *canonical* and *legal*. By "canonical" he does not mean all the impediments allowed by the Canon law of England, for several of these he includes in the class of "legal," but he means those impediments, which, even for civil purposes, could only be treated canonically, and decided upon in an Ecclesiastical Court. And when he says, that marriages under the canonical disabilities of precontract, consanguinity, affinity, and some particular corporal infirmities, are not void *ab initio*, he speaks a language

foreign, as has been seen, to "the rule of the Ecclesiastical "Court," and to the Canons of the English Church, and only correct (if at all) with reference to the Common Law rule, that those marriages "are esteemed valid, to all *civil* "purposes, unless such separation" (viz., a separation by the ecclesiastical magistrate) "be actually made during the "lifetime of the parties."

46. Rolle says, "a divorce *causâ præcontractûs* bastardizes the issue."—"That is," (says Lord Cottenham) "the sentence *makes* them bastards." If a child be really born legitimate, nothing short of an act of the legislature can *make* him otherwise. If, indeed, he be born illegitimate, but for want of proof of the fact, remain for some time in apparent possession of legitimacy, a sentence *declaring* him a bastard, may in common parlance be said to "bastardize" him; and this was probably all that Rolle meant to say. To infer, from such an expression, that the second marriage was not void, is, I humbly submit, no very conclusive argument.

47. Lord Coke tells us, that if a marriage *de facto*, voidable for precontract, be not declared void in the husband's lifetime, it shall not be declared so afterwards, and the wife shall have her dower; for "this," says he, (viz., this marriage *de facto* and not *de jure*) "is *legitimum matrimonium*, "*quoad dotem*." The words "*quoad dotem*," (which Lord Cottenham by oversight omits), clearly imply that *quoad vinculum* the second marriage was not lawful. "If the "woman, party to the contract, became very wife," says his Lordship, "why is she not also to have her dower?" Because the Court, which was to give dower, could not now receive the bishop's certificate that she *was* very wife, and because it was not authorized to receive any other proof of that fact.

48. "In Bunting's case," says the noble and learned peer, "the second marriage was assumed not to be void." No

doubt, the adverse party assumed that Twede's marriage was not void; but the competent Ecclesiastical Court expressly declared that it was; and the Common Law Court as expressly declared, that that sentence was entitled to faith and credit, and took it as the ground of its own judgment in favour of Charles Bunting's legitimacy.

49. Lord Cottenham cites statute 32 Hen. VIII c. 38, as having "prohibited divorces upon pretence of a "former contract." I would respectfully remind his Lordship, that it only prohibited such divorces, when the second marriage had been consummated and the first had not. In all other cases, it was left to the Ecclesiastical Court to pronounce the contract a marriage, and the second marriage a nullity, as it did in the case of the fourteenth century, and in Bunting's case. By what peculiar process of reasoning, the noble and learned peer deduces alike from this statute and its repeal a proof that a contract *per verba de præsenti* did not constitute a valid marriage, I own myself unable to discover.

50. His Lordship thinks that the authorities already noticed establish his five propositions!

51. Nevertheless he proceeds, *ex abundanti*, to notice some cases in which (as it seems to him), "although the "point was not directly raised, the proposition is assumed "that a contract *per verba de præsenti* did not constitute a "marriage." These are *Weld* v. *Chamberlayne*, *The Queen* v. *Fielding*, and *Payne's case*; to which he adds *Collins* v. *Jessot*, and *Wigmore's case*. I have elsewhere noticed them all; but, in deference to his Lordship, I will again endeavour to show that the three first assume no such thing, and that the two last prove the very contrary.

52. *Weld* v. *Chamberlayne* was a question of a marriage *de facto*, in a civil suit at common law. Neither judge nor jury assumed that the marriage was invalid *de jure*; nor were they competent to decide any such question.

53. *The Queen* v. *Fielding* was a trial for bigamy, and according to Lord Coke's doctrine, which seems never to have been questioned, a marriage *de facto* was enough to support the indictment. The jury therefore had only to decide, under the judge's direction, that such a marriage had taken place; whether it constituted a marriage *de jure* with the intervention of the priest, or would have done so without it, they had neither occasion to enquire, nor authority to determine.

54. In *Payne's case*, it was assumed, on all hands, as the ordinary course of proceeding, that the Ecclesiastical Court would hold a contract *de præsenti* to be matrimony, and give sentence accordingly; but some eminent persons doubted whether the parties would immediately after such sentence be recognised by the common law as *Baron* and *Feme*, which terms, as I have shown, were not always applied to those who were styled *Maritus* and *Uxor* in the Ecclesiastical Court. In short, the disputants agreed that the contract would be held a marriage by the competent Court; but some of them doubted whether all the civil consequences of marriage would immediately follow. The grounds of doubts seem to have been these: as the sentence of the competent Court, upon the face of it, not only pronounced the marriage to be valid, but also directed the parties to solemnize it; and as the Civil Court was bound to take that sentence as conclusive, it might seem unreasonable, that a party should be allowed to set up the first part of the document as his title to a civil right, whilst he was manifestly in a state of contumacy as to the other part. Such a doubt as this could only arise, as in fact it did, among persons who admitted the existence of the vinculum.

55. Though the case of *Collins* v. *Jessot* is given very differently by different reporters, yet they all agree in stating that Lord Chief Justice Holt said "a contract *per* "*verba de præsenti* is an actual marriage." Now, certainly,

if my Lord Holt had been notoriously unfit for his high station—if he had been a shallow, ignorant, or visionary lawyer—if he had vented some new and strange doctrine, unknown to all writers of repute, unsupported by any judicial precedent, and only to be found in some obscure record of barbarous legislation—if what he said had been at once repudiated and overruled by his brethren on the bench, and had been laughed to scorn by all succeeding judges—then indeed it would be absurd to pay the slightest attention to his opinion.

56. But I find the late Lord Chancellor Eldon, certainly no mean judge of legal talent, declaring "that Lord Holt "was as great a lawyer as ever sat in Westminster Hall." (8 Ves. 282.) I see, that Lord Holt uses the very words of Swinburne, an ecclesiastical law-writer of high repute, whose work on marriage (though unaccountably overlooked by Lord Cottenham) was constantly referred to by Lord Stowell, and is described "as one of great learning," by the present Lord Chancellor. I observe, that this doctrine of Lord Holt and Swinburne is in strict accordance of principle with all the ecclesiastical judgments for dissolving marriages *ratione præcontractûs* prior to the 32nd of Henry VIII., and subsequent to 3rd Edward VI.; more particularly with that of 1282 cited by Coke; that of the fourteenth century cited by the Lord Chancellor; that in Bunting's case, of the year 1586; and that in Hampden's case, of the year 1587,—and lastly I learn that this same doctrine was unanimously sanctioned and confirmed at the time by Holt's learned colleagues, Justices Gould, Powis, and Powell; and that it has been since acknowledged as sound law by a host of distinguished names, including those of Blackstone, Mansfield, Kenyon, Ellenborough, Eldon, Gibbs, Tenterden, Wynford, Brougham, Denman, Campbell, and Lyndhurst. To overrule a doctrine so

powerfully supported appears to me, I confess, barely within the limits of judicial authority.

57. No wonder that Jessot's case is a great stumbling block to Lord Cottenham. The only wonder is how he could ever get over it. His Lordship adopts the argument, which I have elsewhere had occasion to consider, that the words used by Lord Holt, in this case, are not to be taken nakedly as they sound, but to be construed together with those which he used, two years afterwards, in Wigmore's case; and that so taken they form a rule of *the Canon Law not received in England.* To what purpose a foreign law, wholly inapplicable to the cases before the Court, should have been, on two different occasions, cited, nobody has ventured to conjecture.

58. The Lord Chancellor has unanswerably refuted this hypothesis. "It has been supposed," says he, "that "Lord Holt was speaking of marriage contracts, not with "reference to the Ecclesiastical Law of this country, but "to the general Canon Law; because in Wigmore's case "he used the expression, *the Canon Law.* Undoubtedly "he did so; but by that expression he could only have "meant *the Canon Law received here, and forming part "of the Ecclesiastical Law of this kingdom.* It is quite "obvious that his observations would have been perfectly "irrelevant (a circumstance very unusual with this dis-"tinguished judge) if the expressions were used in any other "sense." Taking Lord Holt's words in the two cases together, on this obvious and natural construction, to what do they amount? They amount to this—"A contract *per "verba de præsenti* is a marriage, by the Canon Law of "England, that is to say, by those parts of the Papal "Decretals, which were received in England before the "Reformation, and have since continued to be law here, "by force of the statute 25 Hen. VIII. c. 19, s. 7. And "we of the Common Law know it to be a marriage; because

" we have often had before us sentences of the Ecclesias-
" tical Courts to that effect, and have always given them
" full faith and credit, as we were bound to do."

59. Observations of this nature were not irrelevant to the motion before the Court in Jessot's case, the real purport of which motion seems to have escaped Lord Cottenham. His Lordship speaks of the suggestion, but he does not seem aware that the object of the motion was to prevent the Ecclesiastial Court (by prohibition) from proceding to set up a marriage alleged, on the face of the libel, in that Court, to have been contracted *per verba de præsenti*, and which, if set up, would have induced the dissolution of a subsequent solemnized marriage, (Gibs. 413). The suggestion, on which the motion was grounded, was (as Lord Cottenham states) that the contract was really *per verba de futuro*, for which the parties had a remedy at common law. But does not his Lordship perceive (I ask it with great submission) that on his theory such a suggestion would have been altogether unnecessary? According to his Lordship, a marriage, in whatever terms worded, if had without the presence of King Eadmund's mass priest, or Archbishop Lanfranc's sacerdotal benediction, or some equivalent provision of unknown antiquity, would have been an absolute nullity, as well in the Ecclesiastical Court, as at common law. If so, the ecclesiastical judge would have very summarily dismissed the libel; or if he had been so ignorant as to admit it to proof, his further proceeding would have been soon stopped by a prohibition from the Common Law Court, without any inquiry in what tense the words of the contract were enunciated. Again (I ask, with the same submission) does not his Lordship consider, that the very suggestion, that the contract was *per verba de futuro*, was a tacit admission by the adverse party, that if it had been *per verba de præsenti* it would have been a valid marriage? The ecclesiastical judge, therefore, and

the counsel, on both sides, must have taken for granted the same rule, that Holt, Gould, Powis, and Powell did, namely, that a contract *de præsenti* was an actual marriage.

60. Nor were Lord Holt's observations less pertinent in *Wigmore's* case; for there also the marriage in question was formed by a contract *de præsenti*, without any clerical intervention. "Such a contract," said Holt, "is a mar-"riage by the Canon Law;" meaning, no doubt, the Canon Law of England. But "why specify the Canon Law," says Lord Cottenham, "if the Common Law was the "same?" For a very obvious reason; because the Canon Law was that, on which the validity of the bond, and the spiritual incidents resulting from it, depended; whereas the Common Law had only to recognize, on these points, what the spiritual authorities might decide. The Canon Law of England declared a contract *de præsenti* to be a valid marriage, but punished the parties, if they availed themselves of its rights, without certain previous solemnities. Lord Cottenham censures Lord Holt for inconsistency, in saying at one time "this (viz. a contract) is a marriage, and they "cannot punish for fornication;" and at another time "if "they cohabit before marriage *in facie ecclesiæ*, they are "for *that* punishable with ecclesiastical censures." But there is no inconsistency in these two statements. "Ils ne "s'ront punies," says Dr. Goldingham, in Bunting's case, "pur adultery ou fornicacõn, mes solem̃t pur contempt en-"counter un edict del Esglise." As the Church considered the parties to be *maritus* and *uxor*, it could not hold their intercourse with each other to be fornication; but though married persons, they were considered to be as much bound to obey the laws of the Church relating to the *consortium lecti*, as those regarding the pleasures of the table. In a ruder age, restraints of the former kind, both before and *after solemnization*, were enforced by the Church, even

with corporal penance. At a much later period, those of the latter kind rendered offenders punishable, not only in the Ecclesiastical Court, but by statute, with a dispensing power in the Archbishop of Canterbury, (3 Co. Inst. 200; 2 Oughton, 41, 42.) The different manners and customs of the present age account for much of the difficulty that is felt, in forming accurate conceptions of the law, as it stood in times long past.

61. Lord Holt, after asserting that a contract *de præsenti* is a marriage by the Canon Law, and observing that a Dissenter's marriage is said not to be a nullity by the law of nature, adds, " but marriages ought to be solemnized " according to the rites of the Church of England, to en- " title to the privileges attending legal marriages, as dower, " thirds," &c. Lord Cottenham seems to suppose that the last proposition is employed in " answer" to the argument for the validity of the Dissenter's marriage; as if Lord Holt meant to contend, that such a marriage was a nullity by the law of nature, because it did not carry certain civil consequences; but such a sophism cannot reasonably be ascribed to the venerable Chief Justice. His argument, in substance, is manifestly this: " I admit, that by the law " of nature, a contract *de præsenti* is sufficient to consti- " tute a marriage, and that the intervention of a priest " is only required by the positive law of man: I admit " further, that the positive Canon Law of England, though " it requires the intervention of a priest, does not in default " of such intervention render the marriage void, but only " irregular. But then you must remember, that this irre- " gularity, when admitted or proved, entails appropriate " penalties, both by the Canon and Common Law; and " that legal privileges will not be accorded to those who " are avowedly in a state of legal contumacy."

62. Lord Cottenham sums up what he conceives to be Lord Holt's opinion, thus—" For a marriage to be *legal*, and to

" give the *rights* of marriage, such as dower, thirds, &c., it " must be solemnized according to the rites of the Church " of England." These are not the precise words of Lord Holt; and with great submission, I think, they differ from what he has said, in substance. I find it difficult to understand how he could have thought, that the absolute *legality* of a marriage depended on such a solemnization, when I remember, that so many bills were brought into Parliament before and after Holt's time, to restrain clandestine marriages, all of which went on the supposition that such marriages were not nullities, but had only too legal an existence. The distinguishing feature of the act of 1753 was its nullifying effect. *Cui bono*, if the marriages were null by the Common Law? How could it happen, if this supposed rule of Lord Holt's was law, that so many marriages solemnized in prisons, inns, and private houses, were pronounced valid by the decrees of competent Courts, giving the parties the civil *status* of husband and wife, and legitimating their issue? Those marriages were certainly not solemnized according to the rites of the Church of England. No solemnization according to the rites of the Church of England could be had any where (if it were not by special licence) except " in the body of the Church." The recently suggested rule, which declares the presence of an episcopally ordained minister to be the one thing needful to validity, is as inconsistent with this supposed opinion of Lord Holt's, as it is with the plain letter of the Rubric. But in truth Lord Holt is so far from saying that a marriage without solemnization cannot be legal, that he says, even without a priest it is only " irregular;" adding expressly that it is " not void." Now, if it be not void, it must, to some purposes at least, be legal.

63. Again, Lord Holt does not assert that a solemnization according to the rites of the Church of England is necessary to give " the *rights* of marriage;" for he well

knew that the most important personal rights are incident to the marriage bond, which in his time might exist without any solemnization. The expression that he used was "the "*privileges* attending legal marriages," and that again limited and explained by the words "as dower, thirds," &c. What he meant was obvious. The law has given certain privileges to solemnized marriages if intrinsically legal, which privileges it has denied to unsolemnized marriages, whether legal or not.

64. The conclusion which Lord Cottenham draws from the cases of Jessot and Wigmore, especially the latter, is that they confirm the rule "that no marriage celebrated "without *the intervention of a person in holy orders* was "valid, for the purpose of conferring *civil* rights, or im- "posing *civil* liabilities." On this statement, two or three remarks occur to me. In the first place, I would very respectfully observe, that it shifts the ground, from that just before supposed to have been taken by Lord Holt, to an entirely new position. "A solemnization according to the "rites of the Church of England," and "the intervention "of a person in holy orders," are two things, I humbly apprehend, somewhat different, in contemplation of law. Secondly, this new statement is very far short of what Lord Cottenham described, in the outset of his speech, as the question to be discussed, viz. "Did a contract of marriage, "*per verba de præsenti tempore*, without the intervention "of a *priest* in holy orders, constitute *a valid marriage, by* "*the law of this country*, as it existed before the passing "of the Marriage Act?" But thirdly,—and what is the most material of all—I would beg deferentially to ask by whom—at what time—in what Court, was the rule last suggested by Lord Cottenham laid down as law? What "decision" is to be found on the point? For *that*, as his Lordship justly observes, "is the first question that a "lawyer would ask." The noble and learned Peer is of

opinion, that the cases, which he has cited, prove the rule to have existed " from the earliest time of which we have " any record, down to the passing of the Marriage Act in " 1753." I have gone through those cases very carefully, and I am so unfortunate as not to understand how any one of them, or all together, prove any such thing: many of them appear to me to prove the very contrary.

65. A marriage celebrated without the intervention of a person in holy orders would certainly not have conferred any civil rights, or imposed any civil liabilities, if it had not been alleged in any Court to exist; or if having been alleged in the Ecclesiastical Court, it had not there been proved to be formed by the free and deliberate consent of two competent persons; or if the temporal Court, consistently with its own rules of practice, had refused to send it to the Ecclesiastical Court for trial. But in the various classes of cases, in which such a marriage was pronounced by the Ecclesiastical Court to be " very matrimony," either in a suit originally brought there, or on an issue referred thither by the Common Law tribunals, the rule of the temporal Courts was " that the judges of *our* law should give " faith and credit to *their* sentences" (4 Co. Rep. 29 a.); or else that " secundum quod ordinarius certificaverit procedat judicium" (Fleta, v. 30): and the marriage so pronounced or certified to be valid was accordingly held valid by the Common Law Court, for the very purpose of grounding on it the civil rights, or civil liabilities, which might happen to be in controversy.

66. For instance, in 1230, Helewisa had contracted with Eudo, and, before solemnizing the marriage, he gave to her a donation. The contract had made her *uxor* by the Canon Law; and therefore she was held incapable of receiving the gift: it seems to me, that this was a civil liability imposed on her by the contract. About the same time, it is stated by Bracton and Fleta, that a certain

man had three sons born of the same woman respectively, before a contract, after a contract, and after a publicly solemnized marriage: and of these sons the *second* was held the lawful heir: it seems to me that the contract conferred on him the civil right of inheritance. Charles Bunting was born after his mother's solemn marriage to Twede, but he was adjudged the lawful son of John Bunting, by reason of his mother's previous contract with the latter: it seems to me, that the contract of his parents conferred on him the civil right of legitimacy. Lord Coke says, that by a divorce *causâ præcontractûs*, the second marriage is null *ab initio;* the wife of that marriage loses her dower, and her children are bastards: it seems to me, that the precontract imposes on the divorced wife and her children heavy civil liabilities. Even where, in a case of dower, the ordinary certifying that the parties were joined "*in vero* "*matrimonio*," added the words "*sed clandestino*," yet the temporal Court gave the civil right of dower on the marriage, without enquiring whether or not "a person in holy "orders had intervened," and with a full certainty that the marriage was not "solemnized according to the rites of the Church of England." (Cro. Car. 351, A.D. 1633.)

67. Moreover, as I humbly conceive, these cases are irreconcileable with Lord Cottenham's next suggestion, that a contract *per verba de præsenti* may have been called, even by common lawyers, "ipsum matrimonium," not because it was the *whole* of marriage, but because it was an *essential part* of that institution. "What the Civil Law con-"sidered as the *whole*," says his Lordship, "the law of "England considered as an *essential part* of marriage." By the "Civil Law" the noble and learned peer undoubtedly means the Canon Law; for the Civil Law, commonly so called, that is the Roman Civil Law, had nothing to do with the discussion. His Lordship, then, admits, that a contract *de præsenti* was the whole of marriage by the

Canon Law: and it has been repeatedly shown that the Canon Law on this point was received here, and formed part of the Ecclesiastical Law of England. Therefore when the Ecclesiastical Court certified, that a contract was a marriage, it certified that it was a *whole* marriage; and what the Ecclesiastical Court certified it to be, that the Common Law Court took it to be, and acted upon it as such, awarding or refusing civil rights, "secundum quod "ordinarius certificaverat."

68. Lord Cottenham having thus brought down his main argument to the period of the Marriage Act in 1753, makes some short observations on that Act (to which I shall presently advert), and then slightly notices a few of the opinions since delivered as to the previous state of the marriage law; but these he considers as "entitled to com- "paratively little weight." The first of these insignificant authorities is *Blackstone*, not speaking of a law of the year 940, or 1076, but of one passed when he himself was a lecturer on the laws of England at Oxford. He declares in his celebrated Commentaries, that "*any* contract" (not merely a contract in presence of a priest, but *any* contract) "made per *verba de præsenti* between persons able to con- "tract, was before the act deemed a *valid marriage* to *many* "purposes." He treats it as a contract "in due form of "law." His Commentaries went through several subsequent editions in his lifetime. He made some alterations in them; but he did not alter this, which the Lord Chancellor cites as an indisputable authority, judiciously remarking, "that the learned commentator must have considered this "statement of the law of marriage as *free from all doubt;* "since he did not think it necessary to cite any authority "in support of the position." Here again Lord Cottenham is directly at issue with the Lord Chancellor, for the former noble and learned peer thinks that Blackstone considered the proposition as established, "that it was *before* the

" Marriage Act *essential* to marriage, that it should be " performed by a person in orders."—Never having heard this opinion ascribed to Blackstone before, I looked, rather anxiously, for the grounds on which it was supposed that he entertained it. True it is, that Blackstone after describing the Act of 1753, " as an innovation upon our an- " cient laws and constitution," and immediately after enumerating several requisites of the validity of marriage *created by that Act*, continues, in the present tense " it *is* held to " be also essential to a marriage that it be performed by a " person in orders;" clearly alluding to the law as it stood *at the time he was writing*.

69. Lord Cottenham, however, applies it to the former state of the law, for two reasons; first, that a mark at the word "orders," refers in the margin to " Salk. 119;" and secondly, because (as his Lordship thinks) " there is no " provision in the Marriage Act requiring the intervention " of a person in orders."—The marginal reference does not *necessarily* imply any thing more than that in page 119 of Salkeld it would be seen, by the case of *Haydon* v. *Gould*, that the "orders" of a Sabbatarian minister were not recognized by the Ecclesiastical Court as " holy orders." —As to the provisions of the Marriage Act, the matter is still plainer. The Marriage Act directs, " that all the rules " prescribed by the Rubric concerning the solemnization " of matrimony, and not altered by that Act, shall be duly " observed." How the rules prescribed by the Rubric concerning the solemnization of matrimony can be duly observed, without " the intervention of a person in orders," I confess myself utterly unable to divine; for the very first direction of the Rubric is, that " the *priest* shall say dearly " beloved, &c." and the rule so prescribed is certainly not altered by the Marriage Act. The authority of Blackstone, therefore, for the doctrine cited from him by the Lord Chancellor, remains, as that eminent personage thought it did,

in the opinion of the great commentator himself, "free from "all doubt."

70. Lord Cottenham notices the opinions of LORD ELLENBOROUGH (in *Rex* v. *Brampton*, 10 East, 288,) and SIR VICARY GIBBS (in *Lautour* v. *Teesdale*, 8 Taunt. 832,) very slightly; because the validity of a marriage contracted without the presence of a person in orders was not the precise point in issue before those distinguished judges. This is very true, but still they gave the weight of their great names to the opinion, that such a marriage was valid in England before 1753.—And so did LORD MANSFIELD (in *Morton* v. *Fenn*, 3 Dougl. 211.)—And so did LORD KENYON (in *Reid* v. *Passer*, Peake, N. P. 232.)—And so did LORD ELDON (substantially) (in *M'Adam* v. *Walker*, 1 Dow, 181).—And so did LORD WYNFORD (in *Smith* v. *Maxwell*, 1 Ry. & Moo. 80.)—And so did LORD TENTERDEN (in *Beer* v. *Ward*), where it *was* the very point in issue. With all the respect that I feel for Lord Cottenham, I cannot but think it strange, that he, who builds so strongly on a supposed opinion of Sir Matthew Hale, contained in a manuscript note, the very meaning of which is altogether disputable, and which relates to a case equally uncertain of the year 1280, or thereabouts, should treat so lightly the concurrent opinions of *all the Chief Justices of the Queen's Bench for the last eighty-eight years*, and of two Chief Justices of the Common Pleas, on the effect of a law passed in the life-time of several of them—opinions delivered judicially from the Bench, in terms admitting of no mistake, acquiesced in by their colleagues in several instances, and never questioned till 1828, when the late Mr. Jacob expressed a sort of qualified dissent from the doctrine, in the addenda to his edition of Roper. Surely, though an opinion thrown out by way of illustration or argument, by a single judge, may not and ought not to be considered as of any binding efficacy, the case is very different when we find

the great legal luminaries of successive generations all agreeing, without one dissentient voice, in the same doctrine, on a subject of universal interest, and of easy research, and most of them expressing it in plain and unequivocal terms, without doubt or hesitation.

71. It has been objected, that Lord Mansfield wavered in his opinion; that Lord Kenyon spoke doubtfully, and that all the rest were dazzled by the authority either of Lord Holt in Jessop's case, or of Lord Stowell in Dalrymple's. I see no vacillation in Lord Mansfield; and it would be contrary to all sound rules of interpretation to construe his words as contradictory, when they will admit of being taken as consistent. In 1753, when advocating, as Solicitor-General, in the House of Commons, the bill which afterwards became the Marriage Act, he observed, that a marriage without the intervention of a clergyman was "*good*" by the law of nature, but "*not good*" by the law of this and *every Christian society*. Now certainly the words "not good" are not of necessity equivalent to "null:" and whatever the law of England might be, Lord Mansfield could not be so ignorant as to suppose that every Christian society had made such marriages mere nullities, when the contrary was notoriously the law of his own native country, Scotland. He evidently used the word "good" in the sense of regular, and conformable to the demands of the law: and his argument was no more than this: "what "is regular by the law of nature, may be irregular by the "law of a civil society; and what the law of civil society "has declared to be irregular, it may, if necessary, go on "to declare void." And in support of this, he cited the instance of the Statute of Frauds, where many things which the law had previously discountenanced, were for the first time rendered of no effect. Now this, though spoken in the warmth of debate, is not contrary to what he said, thirty years afterwards, deliberately, from the bench of justice

in *Morton* v. *Fenn;* nor to what he laid down still more fully three years afterwards in *Rex* v. *Hodnett,* (1 T. R. 99). In the former case, speaking of a promise *subsecutâ copulâ,* he said, "this would have been (before the Mar-"riage Act) a good marriage, and the children legitimate, "by the rules of the Common Law;" meaning, I presume, that it would have been pronounced a valid marriage by the Ecclesiastical Court, and then the Common Law would have held the children to be legitimate. In the other case he stated the law in these explicit terms: "before this act "passed, by the laws then in being, if a man and woman "made a contract in private *per verba de præsenti,* and kept "it a secret, and afterwards there was a public marriage "solemnized by either of them, and issue born of that mar-"riage; nevertheless the private contract took place of the "subsequent marriage; because the *Canon* Law compelled "a strict observance of these contracts, and decreed them "to be solemnized in the face of the Church. Therefore "*clandestine marriages* were so far, to be sure, practicable. "The law of England executed in the Ecclesiastical Courts "prohibited them, and made it unlawful to marry any "person in private. All other marriages (than those by "banns or licence) were illegal; but *not being vacated,* "the practice still continued." Here it is to be particularly noticed, that this venerable judge called the contracts in question "clandestine *marriages;*" that he expressly asserts, that though "prohibited," and therefore "*illegal,*" still they were "*not vacated,*" and that he also (as Lord Holt had done before him) gives the name of the "*Canon* Law," to "the law of England executed in the Ecclesiastical Courts."

72. As to Lord Kenyon's adding, when he stated his opinion, "I do not speak, meaning to be bound"—that, as Lord Brougham justly observes, is no more than the caution, which any discreet judge would use, in dealing with

a proposition of such importance at Nisi Prius. But then a number of great and learned judges were dazzled by the authority of Lord Holt in *Collins* v. *Jessott!* At least this allows, that they understood Lord Holt to speak in the plain sense of the words which he used, and not in the distorted signification recently given to them. Again, those who after 1811 gave their sanction to the former efficacy of a contract *de præsenti*, are surmised to have been influenced by the opinion of Lord Stowell. If it were so, they would only have paid due deference, in a matter peculiarly of ecclesiastical cognizance, to the greatest ecclesiastical lawyer of his age. But why should we suppose that they were thus blindly submissive to great names? Might they not have consulted (as the Lord Chancellor judiciously did) the works of Swinburne and Ayliffe? Might they not have heard of the opinion of Sir E. Simpson (cited also by the Lord Chancellor)? Might they not, in short, have had access to the numberless authorities, which I have elsewhere noticed, to the same effect? Or, if the learned judges, or any of them, remained satisfied with the law as laid down by Lord Holt or Lord Stowell, was it not, after all, more becoming and reasonable in them to follow such guidance, than to dispute such authority? I must not however forget to observe, that neither of these objections can be made to the opinion of that learned and laborious lawyer, the late Sir G. Holroyd, which will be found in the Appendix. He at least did not trust to Lord Holt alone, for he cites almost all the common law authorities subsequent in date to the Reformation, which late researches have found to be relevant. Nor could he be influenced by the judgment in Dalrymple, for he wrote seven years before it was pronounced.

73. I have adverted to the learned work of Swinburne, and I cannot do so without expressing my sincere regret that Lord Cottenham, in his researches into the law of the

Ecclesiastical Courts, should have either overlooked so valuable a production as the Treatise on "Spousals," or been repelled by its quaint and antiquated style. Had his lordship given it an attentive perusal, he would have discovered that the Ordinances of Eadmund and Lanfranc were utterly at variance with the ecclesiastical jurisprudence of the sixteenth century; whilst the Decretals respecting marriage (to which also his lordship seems to be a stranger) are constantly cited as law by Swinburne; as they were, after his time, by Zouch, Godolphin, Ayliffe, and every other ecclesiastical lawyer of repute, down to and including Lord Stowell himself. I have elsewhere extracted from Swinburne the passages which place it beyond a doubt, that by the ecclesiastical law in Qeeen Elizabeth's reign, a marriage contract in words of present time was an actual marriage; and I need not repeat those passages here, more especially as the Lord Chancellor cited them, with entire approbation, in the very outset of his able argument.

74. Lord Cottenham has read, indeed, Lord Stowell's universally admired judgment in *Dalrymple* v. *Dalrymple;* but he has given it a construction, so far as I know, perfectly novel. "Lord Stowell's opinion" (says the noble and learned Peer) "has been supposed to be much more "*decisive* in favour of the validity, as a marriage, of a mere "contract *per verba de præsenti*, than upon a *careful exa-* "*mination* of what he there says it appears to be." Having been counsel in that cause both in the Consistory and in the two successive Courts of Appeal, I had occasion to examine the sentence pretty carefully; and it was perhaps still more carefully examined by the eminent counsel on the other side. But we none of us discovered any thing indecisive in Lord Stowell's language. He said, "the consent "of two parties, expressed in words of present mutual ac- "ceptance, constituted an actual and legal marriage."

Surely this was plain enough; nor did it differ in substance from what he had said sixteen years before in *Lindo* v. *Belisario*, viz. "The rule prevailed in all times as "the rule of the Canon law, *which existed in this country* "and in Scotland, (till other civil regulations interfered in "this country,) that a mutual engagement or betrothment "*is a good marriage.*" Again, in Dalrymple, he said, "the Ecclesiastical Courts, which had the cognizance of "matrimonial causes, enforced the rule, which held an irre-"gular marriage constituted *per verba de præsenti*, not "followed by any consummation, *valid.*" Nor did the learned judge stop even here. It might have been supposed that he meant valid, until defeated by a subsequent and more formal marriage with another person. No, says the judge, not merely so; but "valid to the *full extent* of "avoiding a subsequent regular marriage contracted with "another person." To the full extent—evidently implying that this circumstance was as strong a proof of validity as could be well conceived, which indeed it was; for it is difficult to figure to one's self a contract more binding than one which disables the parties, so long as they both live, from forming a valid contract of the like nature with any other person; and which, though destitute of all formality itself, outweighs and annuls a contract invested with the most sacred solemnities.

75. To the decisive character of these passages Lord Cottenham opposes a passage, which he seems to consider of a contrary purport. Lord Stowell says, that "the "common law had scruples in applying the civil rights of "dower, community of goods, and legitimacy, in the case "of these looser species of marriage." With great submission, I cannot see how it is to be inferred from these words that the looser species of marriage are no marriages at all —or that the refusal of a civil right necessarily implies the annulment of a spiritual bond—or that *fieri non debet* is

always equivalent, in law, to *factum non valet.* Why were secret and unsolemn contracts so strongly discountenanced by both laws? Lord Denman has given to this question a *reponse sans replique.* He informs us that the Synod of Exeter, in the thirteenth century, and Archbishop Bourchier, in the fifteenth, inveighed against them, because they led to the lamentable divorces *ratione præcontractûs,* by which the innocent wife and offspring of a second marriage might be branded with the stigmas of concubinage and illegitimacy, on account of a first marriage. *That* was the evil. The first marriage was *too* valid; it was a sacrament; it could not be annulled, whatever injustice it might work. It was prohibited and punished, *because* it had the power of working injustice; and these very prohibitions and punishments, which have been cited as proofs of its nullity, were, on the contrary, conclusive proofs of its unimpeachable validity.

76. What Lord Denman observed of the ordinances of the thirteenth and fifteenth centuries, applies equally to those of the fourteenth century, to be found in Lyndewood, under the dates of 1322, 1328, and 1342. They threatened secret contracts of marriage even with excommunication, the heaviest of all spiritual scourges, and one which at that time involved grievous civil penalties; but they did not dare to pronounce the annulment of the contract. There was a plain ecclesiastical process to *declare* the nullity of the second marriage; there was none either to declare null, or to make null the first. Had the *Reformatio Legum Ecclesiasticarum,* compiled in the reign of Edward VI., become law, the case would have been different. Contracts *de præsenti* would have been at an end. But that scheme of Church government contained too glaring invasions of the temporal domain to be tolerated by so politic a sovereign as Queen Elizabeth; and we learn from *Swinburne,* that the law of the Ecclesiastical Courts, in that prin-

cess's reign, was, on the point in question, the very same as it had been for four preceding centuries, and as we know it continued to be (with a short interval during the Commonwealth) for a century and a half afterwards.

77. I have elsewhere shown, that the same inference which Lord Denman draws from the early ecclesiastical ordinances for restraining clandestine marriages, is to be drawn from the various bills, for the like purpose, which were brought into Parliament between 1666 and 1753. They all went on the ground, that a marriage, howsoever contracted, was indissoluble; and therefore, that the evils of a clandestine marriage were irreparable. They left the question of what constituted a valid marriage to the Ecclesiastical Law; and the Ecclesiastical Law, plainly laid down by Swinburne, Ayliffe, and other writers of authority in the ecclesiastical forum, agreed with the general Canon Law, in holding a contract *de præsenti* to be a valid though irregular marriage. All the modes proposed to prevent clandestine marriage (except in one bill, which failed) were confined to punishing the irregularity. At length the same argument which had prevailed with the Council of Trent in 1563, prevailed with the English Parliament in 1753. Prohibitions, said the decree of the Tridentine Council, have been found, by long experience, to be ineffectual, and therefore it is determined to declare the irregular marriages absolute nullities.

78. This nullifying clause was, as I have said before, the distinguishing feature of the Act of 1753. It was this that raised such a storm of opposition, in and out of Parliament, against the bill's passing; and justified Blackstone, after it had passed, in calling it "an innovation upon our ancient "laws and constitution." *Prohibitions* were no innovation. They had always been loudly denounced against every mode of contracting marriage, except the regular and formal mode preceded by banns or licence, and the consent (where

necessary) of parents or guardians, and accompanied with a celebration, during canonical hours and seasons, at the door, or in the body of the proper parish church, administered by a duly ordained and appointed ecclesiastic, with the ring, the prayers, the exhortation, the benediction, and all the other formalities of the ritual. Every thing short of this was punishable, with more or less severity, according to the greater or less contempt of the "edicts del "Esglise." *Penances* were imposed: and be it remembered, these, in the rude ages, included no infrequent use of the scourge, inflicted (so the old books describe it) by the priest himself, behind the altar, on the naked bodies of men and women, unless they were able and willing to buy off the stripes with money, which they were expressly authorized to do (A.D. 1315) by the stat. 9 Edw. II. c. 2. In flagrant cases of clandestine marriage, even the *greater excommunication* was pronounced, a punishment which, whilst it alarmed the conscience of the offender with the most awful terrors, and cut him off from the sacraments and other holy offices of the church, disabled him from the enjoyment of the most important civil rights, and drove him as a branded outcast from society. "Excommunicati so-"lenniter," says Archbishop Stratford (A.D. 1342), "in "locis insignibus, pulsatis campanis, candelis accensis, pub-"licè nuncientur; ac ipsis commercium, ad eorum commo-"dum, et fidelium communio inhibeatur omninò; commu-"nicantesque cum eisdem illicitè censurâ ecclesiasticâ, sine "delectu, acriter puniantur." In later times statutable and canonical penalties, of various kinds, were enacted; but all were in vain, because neither church nor state had declared such marriages to be void; and the reason why so simple a measure had not been adopted was, that according to the prevalent opinions of the times it was beyond all human authority to put asunder those whom God had joined together. The Council of Trent, in 1563, and the Parliament

of Great Britain in 1753, cut the gordian knot; the one by assuming to the church a power, which, it at the same moment confessed, the Church had never before exercised; the other by assuming to the state a like power equally unprecedented in English legislation.

79. Such was the view, which, so far as I have ever heard or understood, was always taken of the object and effect of this too memorable Act of Parliament. But a new theory has lately been broached, to which I regret to find that Lord Cottenham, after some hesitation, has become a convert. According to this theory, by the law of England, prior to 1753, a contract of marriage might have been entered into freely, honestly, deliberately, seriously, solemnly, in the face of day, by two persons of full age and competency, or if minors with the entire consent of their parents or guardians; they might have taken each other as husband and wife before an assembly of most respectable witnesses, in plain unequivocal words of present time, nay (as in the case of Lord William Fitzmaurice, Deleg. 1732) in the very words of the English ritual read from the Prayer Book, and all this might have been followed by consummation, offspring, and years of open cohabitation; and yet the ceremony would not have been a solemnization nor the bond of union a marriage; but a mere contract "inopera-"tive (as Lord Cottenham says) till enforced," that is to say, in plain terms, giving to each party a bare right of action to compel a specific performance, by solemnization *in facie ecclesiæ*. Whilst, on the other hand, let but a profligate, suspended, degraded clergyman be present, though it was in a prison or a brothel, the ceremony instantly became a solemnization, the parties were married, irregularly, it is true, but requiring no further observance of the ritual, nor any application to a court of justice to pronounce them man and wife. Whether the reverend gentleman was to say or do anything, or whether his bare presence was suf-

ficient; and whether if he uttered any words, they might be extempore effusions, or recitals from the English or any other ritual, the inventors of this theory do not seem to have yet determined: only they say he must have had holy orders from the Church of England, or the Church of Rome, however he might have subsequently disgraced his sacred calling. No doubt, many contracts per verba *de præsenti* were formed under such auspices: and the ignorant parties probably thought them the more binding on that account; but that the vinculum thereby acquired any addition to its legal validity, I am yet to learn.

80. I respectfully beg leave, however, to examine this theory more closely. It depends on the postulate that a contract *per verba de præsenti* alone gave only a right of action to compel a specific performance. Lord Cottenham is well acquainted with the nature of such rights: and I ask for information, whether they must not necessarily be defeasible by what is called, in some systems of jurisprudence, a *medium impedimentum?* "If the thing which was due," says Pothier, "become, in consequence of something, which "afterwards occurs, no longer susceptible of being the "matter and object of the obligation in question, the obli- "gation itself is at an end." (Obl. s. 614.) "Thus, when a man promised (to purchase or give) the slave of another, and before the promise could be accomplished the slave obtained his freedom, the promiser's obligation ceased, except in so far as he might be required to compensate a loss occasioned in the transaction by his own malice or negligence." (Ulpian, D. 45, 1, 51.) So, as I have always understood, our own Courts of Equity will not decree a specific performance on the application of a party, who by his own laches, by connivance, by fraud or otherwise, has suffered such a change of circumstances to grow up, that his claim cannot be enforced without injustice to others, more especially to parties wholly innocent and blameless.

81. Now Lord Cottenham is well aware, that for centuries prior to 1753, divorces *ratione præcontractûs* had been in use in the Ecclesiastical Courts, and had been recognized and acted upon by the Courts of Common Law. But the only circumstances that could lead to such a divorce were of this nature. A. formed a contract of marriage *per verba de præsenti* with B., which perhaps he did not consummate. Subsequently he married C. *in facie Ecclesiæ*, and perhaps had issue by her. B. instituted a suit in the Ecclesiastical Court to recover A. as her husband. If the new theory be correct, the Court must have said to her, "You come too late. You made a contract with a single "man, and should have enforced it while he was single. "By your laches, or at all events to your disadvantage, a "new state of things has occurred. He is no longer "single. He is the husband of another woman, the father "of her children. His obligation to you, so far as regards "a specific performance, is at an end; or at the utmost re-"solves itself into an obligation to pay damages, which is "to be enforced by a different kind of action, and in a "court of different jurisdiction."

82. But as is well known, the Ecclesiastical Court took the very opposite course. It pronounced *for* the precontract, and *against* the public marriage. It declared that the precontract was operative *ab initio*, as "true, pure, and "perfect matrimony," rendering the parties husband and wife from the moment of its formation, as firmly and indissolubly (whether a priest was present or not) as if they had been joined together with the most solemn rites, in the face of an assembled congregation. It declared that the second marriage, though blest and consummated, was *ab initio* null and void, as having been contracted between parties one of whom was disabled from legally contracting by a prior bond. Did the King's Courts object to this? Did *they* assert that the contract should have been declared

inoperative; that by the law of the land it had given only a defeasible right; that such right had been defeated by the mid impediment of a subsequent marriage; and that consequently the further proceedings of the Ecclesiastical Court should be prohibited? Far from it. On the contrary, they enforced the sentence of the Canon Law more harshly than the Canon Law itself would have done. The rule of Pope Alexander III (A. D. 1170) was "separato "matrimonio, in facie ecclesiæ contracto, filii geniti vel "concepti ante sententiam, sunt legitimi." (Decretal. 4, 17, 2.) The rule laid down by Lord Coke is, "that by "the divorce *causâ præcontractûs*, there is a nullity of the "(second) marriage *ab initio:* and the children between "them are mere *bastards*." (2 Co. Inst. 93.)

83. The effect, which Lord Cottenham ascribes to a contract *per verba de præsenti*, is precisely that which the law gave to a contract *per verba de futuro*. The latter was "inoperative (at least as a marriage) till enforced;" and if a mid impediment arose, it could not be enforced at all. A marriage with a third person was such an impediment; it was the stronger bond, and therefore dissolved the weaker. "Cùm matrimonium fortius sit vinculum, nemini "dubium est, priora sponsalia dissolvere." (Sanchez, Sacr. Matrim. 1, 48, 1.) On the other hand, when two marriages clashed, the prior in time was the stronger in right. "Quo-"ties sunt duo vincula paria, incompossibilia, prius præ-"valet et dirimit posterius." (Ibid. 1, 72, 2.) To apply the rules respecting the one of these two species of contracts to the other is to introduce into ecclesiastical jurisprudence inextricable confusion.

84. Having thus shown that the basis of the new theory for explaining the Marriage Act of 1753 fails, nothing but the respect due to Lord Cottenham would make me notice the objections built on such a theory. His Lordship thinks it strange, that if a contract *de præsenti* was a mode of

constituting marriage, the act in qnestion should not have alluded to it as such mode. But since there were several modes of constituting marriage, why a legislator, who intended to abolish all but one, should specifically describe any of the rest, or how his not having described one particular mode can prove that no such mode was known in practice, his Lordship has not explained, and I am unable to conjecture.

85. "By section 8," says his Lordship, "the act makes "null and void all marriages *solemnized* by any persons "except in the manner prescribed, but takes no notice of "marriages arising from contract without solemnization, "except in section 13, by prohibiting suits to compel cele- "bration of marriage by reason of such contracts." I have elsewhere dealt with this objection; but as his Lordship has reproduced it, I would respectfully suggest, that it would have been desirable for him to define in some manner, and upon some authority, what he precisely means by "solemnization." The act says that all marriages solemnized without publication of banns or license shall be void. Let us take, for example, the case of Lord W. Fitzmaurice before mentioned. He contracted *per verba de præsenti* with Mrs. Leeson, and the contract was held to be a marriage. He accompanied that contract with many solemn acts, reading from the book of Common Prayer, taking her by the hand, and putting the ring on her finger, as there directed, and swearing to God, in the presence and hearing of witnesses. Supposing that all this had taken place after the act, would it not have been void by the act? It is true that the marriage was had in a private house; but the act speaks of marriages solemnized in prisons, inns, and other places; the word solemnized, therefore, does not import a solemnization according to the rites and ceremonies of the church of England; for that, except by special license, must be "in the body of the church."

86. I collect from various expressions of Lord Cottenham's, that his Lordship understands by "solemnization" something which can only be done by an episcopally ordained minister; but what that something is, his Lordship has not specified. He speaks of such a person's "intervening" and "officiating;" but in what manner he is to intervene, or how he is to officiate, so as to render the proceeding a solemnization, *non constat.* It has been suggested, that he must use the customary words, but how are we to ascertain what customs prevailed in prisons, inns, and other places, where marriages were clandestinely contracted? And if one drunken parson used one set of words, and another another, which marriage was solemnized, and which not? And howsoever all this may be explained, I cannot but think it would be desirable to know what legal authority there is for confining the word "solemnize" to that peculiar signification in which Lord Cottenham seems to use it. In its general acceptation, it is neither so limited as to the person, nor so lax as to the mode. Many solemn acts may be done by laymen; but solemn words must be of a fixed and determinate character; such as those often cited in the ecclesiastical law books, "I take thee to be my "husband,"—"I take thee to be my wife." Unless therefore it can be shown, that no layman can by possibility solemnize a marriage, (which seems inconsistent with a recent statute), I should be disposed to hold that the 8th section of the act annuls marriages contracted *per verba de præsenti* as well without as with the intervention of an ecclesiastic. After all, I repeat what I have elsewhere said: there can be no sound argument deduced from apparent discrepancies in a statute known to have been so much altered to meet temporary and personal feelings, as the Marriage act of 1753.

87. The marriages of Jews and Quakers being exempted (by sect. 18.) from the operation of the act, Lord Cotten-

ham next adverts to the arguments which have arisen from that circumstance. And first as to marriages of the former class.—" Both Sir William Wynne and Lord Stowell," (says his Lordship), " assume that the validity of a Jewish mar- " riage was to depend on the laws and customs of the " Jews." Upon that Lord Cottenham seems to indicate some doubt. I will therefore take leave to state why I consider the opinion of the two venerable judges to be perfectly correct. The early Christian Church tolerated the marriages of Christians with unbelievers (St. Paul; 1 Cor. vii. 12), and recognized as valid those of unbelievers among themselves, which indeed Pope Innocent III. (A.D. 1215,) called in a larger sense sacraments, (Decretal. 4, 14, 4; and 4, 19, 8.) The Jews were of course ranked as unbelievers, and our Common Law seems anciently to have regarded them and all other infidels as a sort of alien enemies living here under the King's safeguard, and following in their domestic concerns their own peculiar usages. The Ecclesiastical Courts did not compel them to observe the usages of the Church; on the principle perhaps rather coarsely stated by *Maranta*. " De animâ Judæi non se " impedit Ecclesia." (Specul. Aur. p. 3, s. 57.) The same author subsequently adds, " servatur lex Mosaica " inter Judæos quoad matrimonium,"—" nec judicantur " secundùm canones, sed secundùm ritus eorum." (Ibid. ss. 58, 59.)

88. It is not till a comparatively late period that we hear of any question on a Jewish marriage being agitated in the Ecclesiastical Court. In *Vigevena* v. *Alvarez*, (A.D. 1794,) where an issue had been sent from Chancery to try the validity of a Jewish marriage in the Court of Arches, Sir William Wynne doubted whether it was not as fit to be tried by a jury: and indeed the Ecclesiastical judge could only try it as a question of foreign law, receiving evidence of that law, as a matter of fact, in the same

manner that a jury must have done. For these reasons, too, Lord Stowell took the evidence of certain Jewish rabbies as to the usages of their nation, and said, " I receive " this as information respecting *foreign law*, upon which " this court has to determine." It is manifest, that judgments so formed can bear no relation to the constitution of a marriage among Christians.

89. The marriages of *Quakers* stood on a very different footing. The members of that body were, for a long time, only dealt with as dissenters, holding tenets peculiarly obnoxious both to church and state: insomuch that under the statute 13 & 14 Car. II. c. 1, they might have become liable even to transportation. In this state of things, and with their violent prejudices against church government, they were not likely to bring marriage questions before the Ecclesiastical Courts. But the revolution of 1688 produced a change in the frame of English society, to which, perhaps, as affecting the matrimonial law, sufficient attention has not been directed. By the *Toleration Act*, (stat. 1 W. & M. c. 18), Protestant dissenters were, for the first time, recognized as entitled to full protection in the peaceful exercise of their religion: and among other provisions in their favour, it was enacted, on certain conditions, that they should not be prosecuted in any Ecclesiastical court for not conforming to the Church of England. The act expressly mentioned Quakers, and allowed them, on making a prescribed declaration, to enjoy all the benefits which any other dissenters might enjoy by virtue of that Act.

90. Now, by the ecclesiastical law itself, as has been already seen, a man and woman, who had made a contract *de præsenti* were recognized as married persons: their sexual intercourse before solemnization was no crime, but merely a nonconformance to an ecclesiastical edict, for which non-conformance the Ecclesiastical Court could no longer punish them. The effect of the law in this respect

was brought into discussion within four years after its enactment. One *Hutchinson* and his wife, who were dissenters, and had married in the face of a dissenting congregation, were libelled against in an Ecclesiastical Court for fornication. They applied for a prohibition, which the court ordered to issue, for the purpose of suspending the proceedings of the Ecclesiastical Court; so that the plaintiffs might declare in prohibition, and on a demurrer the law might be tried. (Hutchinson et ux. v. Brookbank, 3 Lev. 376.) Probably neither party wished to incur additional expence. The man and woman appear to have remained undisturbed: and we hear of no further attempts by Ecclesiastical Courts to exercise their jurisdiction, in a similar manner, over dissenters. Lord Cottenham observes, that the Court of King's Bench did not issue its prohibition on the ground that a contract *de præsenti* was a marriage. Most assuredly it did not; and that for a very plain reason: it had no means of determining such a point on its own authority. Whether the marriage in that case had been validly constituted was a question of spiritual law, which the King's courts could not examine: whether the spiritual judge could legally punish dissenters for nonconformity was a question under the Toleration Act, which the King's courts alone could decide. The rule was different where the parties were members of the Church of England, as in the case of *Middleton* et ux. v. *Croft*, (A.D. 1736), where it was held that by the ancient canon law remaining in force, the Ecclesiastical Court could punish the plaintiffs, (they being members of the church), for contracting marriage clandestinely. (Str. 1056, 2 Atk. 250.) Again, Lord Cottenham observes, that in *Houghton* v. *Houghton*, (1 Molloy, 611), which was a marriage between Quakers, Lord Manners did not rest on the ground of a contract *de præsenti*: to which the same answer is to be given, as before: it was not his business to do so: he had only to consider whether the

marriage was protected by law, to the extent of the matters in controversy before him, and finding that it was, he so decided.

91. Lord Cottenham holds that prior to the act of 1753 no marriage celebrated, without the intervention of a person in holy orders, could confer civil rights, or impose civil liabilities. It is certain, that the marriages of Quakers never were so celebrated: and his Lordship does not deny, that since that act they have had such a civil operation. Let us see, then, how they were affected by the act. The only section relating to them specifically is the 18th, which is in these words: "Provided likewise, that nothing in this "act contained shall extend to that part of Great Britain "called *Scotland*, nor to any marriages amongst the people "called Quakers, or amongst the persons professing the "Jewish religion, where both the parties to any such mar-"riage shall be of the people called Quakers, or persons "professing the Jewish religion respectively; nor to any "marriages solemnized beyond the seas." It is said the act *validates* the marriages of Quakers by implication. How a statute *not extending* to a marriage should give it any force, which it did not before possess, it would be hard to say; but it may be easily conceived, that if before 1753 the marriages of Jews or Quakers, or those contracted in Scotland, or beyond sea, without the intervention of an ecclesiastic, were considered as marriages *de facto*, entitling the parties to any civil privileges, the mention of them in the act, as exempt from its restraints, might be deemed a tacit recognition of their former efficacy. In this view, the remark of Sir W. Wynne on the Jewish marriage in *Vigevena* (otherwise called Silveira) v. *Alvarez*, (1 Hag. C. R. App. p. 7,) seems applicable to all the four classes of marriage mentioned in the 18th section. Upon the whole, therefore, the supposed difficulties arising from the recognition of some of these marriages, as entitling the parties to certain civil

rights, or imposing on them certain civil liabilities, will vanish, when the cases are considered on the principles which I have here endeavoured to explain.

92. Elsewhere Lord Cottenham objects, that "there "are acts relating to Quakers, in which their marriages are "called *pretended* marriages." I own I am somewhat surprised that his Lordship should think such an objection worth repeating six months after it had been unanswerably refuted by Lord Campbell. "The statute 6 & 7 Will. III. "c. 6, (says the latter noble and learned peer) furnishes, "I think, when properly examined, strong evidence to "show that these were legal marriages. The act is for "granting to his Majesty certain rates and duties upon "*marriages*, births, and burials. Quakers marrying are "expressly subjected to the duty. In one place, the mar-"riage between them is called a *pretended* marriage; but "by this uncivil expression was it intended to declare that "the marriage was void, and to levy a tax on concubinage? "On the contrary, it is declared, that any such *marriage*, "*or pretended marriage*, shall be of the same force and "nature as if the act had not been made." This very act, therefore, implies that some marriages of Quakers had a legal operation, whilst others, which pretended to the same character, might possibly, on examination, have been found defective; but it neither weakens the one nor strengthens the other; only providing, that persons, who claimed under them to be treated as married, should be so treated, for the purpose of taxation.

93. This slight and equivocal word "pretended," imply-ing, at the utmost, a doubt of the validity of some such marriages, is far outweighed by the expressions of a contrary import, employed in Parliament on occasion of two bills for restraining clandestine marriages. The first of these bills was in 1690, when an instruction was given to the committee to insert a clause, enacting that all clandestine mar-

riages should be null: whereupon a motion was made, that it should not *extend* to the marriages of Quakers; (Com. Journ. V. 10, p. 451, &c.); clearly showing, that the supporters of the motion, at least, thought that those marriages, if not annulled by the act, would have some legal operation. The other bill was in 1718, when a clause was added by the committee, and *agreed to by the House*, "that the "act should not extend to *prejudice* the marriages of "Quakers, *solemnized* by Quakers between Quakers;" (Com. Journ. V. 19, p. 135); where it is to be observed, that in the opinion of one branch of the legislature the marriages of Quakers were already under the protection of the law, and ought to be continued so; and moreover, that marriages might be *solemnized* without the intervention of a person in holy orders.

94. After all, Lord Cottenham admits, that it is "im- "possible not to feel the importance of the fact, that the "marriages of Quakers have been recognized in several "cases"—a fact which his Lordship thinks "very difficult "to be explained." If I am right, in what I have already said on this topic, there will be no great difficulty in explaining the different modes in which these marriages were dealt with in the Ecclesiastical and Temporal Courts. I am not aware that in the Ecclesiastical Courts any distinction was made, before 1753, between the marriages of Quakers and those of other Dissenters; they being all considered merely as including contracts *de præsenti*, requiring, for their perfect regularity, a solemnization *in facie ecclesiæ* (that is, in the face of the *English* Church), though valid as to the *vinculum*. There was, indeed, a considerable difference, after the Toleration Act, between the criminal and civil proceedings. In criminal suits, the spiritual judges were restrained from punishing married Dissenters, either on the ground of their personal intercourse with each other, or on that of contempt in not conforming to the

ecclesiastical ordinances. In civil suits, such a contempt, while it lasted (whether on the part of Dissenters or others), was a bar to relief, on the principle before stated, "frustrà "ecclesiæ auxilium implorat, qui ejus contempserit autho- "ritatem." On this ground, restitution of conjugal rights was refused, where the marriage had not been duly solemnized. "Petens restitutionem uxoris non auditur, de jure, "ubi matrimonium est contractum illicitè." (Joan. de Atho, ad Othob. p. 28), a rule, which seems to have governed the case of *Green* v. *Green* (where the parties were Quakers), referred to by Sir W. Wynne in *Lindo* v. *Belisario*. On the same general principle of contempt barring relief, administration was refused in *Haydon* v. *Gould* to a husband by an irregular marriage. In *Wigmore's case*, alimony would perhaps have been eventually refused to the wife (other than *pendente lite*), unless it had appeared that she was willing to purge the contempt arising from her irregular marriage by a regular solemnization. The report of this case, indeed, is too slight to enable any one to speak decisively as to the proceedings in the Ecclesiastical Court. But in *Haswell* v. *Dodgshon* (A. D. 1730), (Letter to Lord Brougham, p. 59), where the woman sued, on a Quaker's marriage, to compel a regular solemnization, the records show, that pending the suit, she was allowed her costs from time to time, as a wife, according to the ordinary practice, where a fact of marriage is admitted. On the other hand, if a marriage was had in a foreign country, though not in the forms of our Church, yet not being in contempt of the Church, it was supported by a decree of the Court, as in *Wescombe* v. *Dods* (A.D. 1751), (1 Lee, 59), and in *Bavington* v. *Bavington* (A.D. 1752), (Letter to Lord Brougham, p. 61).

95. In the Temporal Courts, prior to 1753, the marriages of Quakers or other Dissenters (except during the Commonwealth), could only be considered as marriages alleged

to have taken place *de facto.* In that view, they seem to have been regarded with some doubt until the Toleration Act. Sir Matthew Hale, who died some years before that act, was disposed to treat them favourably: yet he seems to have felt a difficulty in allowing them to entitle parties to the civil privileges of a legal marriage; nor is this wonderful, when we reflect that such marriages were generally contracted in conventicles, the very attendance at which was rendered by the acts of 1664 and 1670 so highly penal. Even after the principle of toleration had been sanctioned by law, as "an effectual means to unite their "Majesties' Protestant subjects in interest and affection," it could not immediately obliterate the impressions of old precedent and long established practice. For in the earliest known periods of our law nothing probably was recognized by a jury as a marriage *de facto,* which was not solemnized openly and publicly, in the sight of the vicinage, assembled at the House of Prayer. Afterwards, a ceremony performed, with a mass, in a chapel or private oratory, may have been deemed sufficient, and still later, in a chamber, before a sufficient number of competent witnesses. In those times, however, it must be remembered, no such persons as "Dissenters" were known either to judge or jury: all who differed from the Church were "infidels," "heretics," or "schismatics," using none of the external signs by which marriage was known, as a fact *in pais,* and therefore unable in the estimation of a jury to contract a marriage *de facto.*

96. But when, in a succeeding age, marriage was no longer deemed a sacrament; and much more, when heresy or schism subsided into the gentler form of dissent, and as such was, within certain limits, recognized and protected by the state, it is obvious, that the common law notion of a marriage *de facto* must have undergone a corresponding modification. A marriage *de facto* might have

been irregular in ancient times, on account of consanguinity, or other causes, which the jury could not examine; but in such cases, the defect (as far as regarded the jurors) was a *latent* one. On the other hand, when an open disregard of the forms of the Church was shown by marrying in a conventicle, the defect was *patent;* and some hesitation to recognize a union so formed, as a marriage *de facto,* was at first to be expected. That hesitation, however, must have given way to mature reflection on the principles established by the Toleration Act; and in truth, when the Ecclesiastical Court, the only competent tribunal for determining on the validity of marriage, acknowledged that two persons so joined were husband and wife; that they were at liberty to treat each other as such, and could not be punished either for so doing, or for not solemnizing their union in the mode directed by the Church, there would have been some inconsistency in the Common Law Courts regarding the union of the parties as a mere nullity.

97. Hence it is easy to account for the rights of succession and of action founded on such marriages. Hence "the number of cases (as Lord Brougham powerfully "urges) in which titles must have been made and deduced "through the issue of Quaker marriages; nay, the number "of cases of persons, who born of such marriages have "been allowed quietly to take estates real and personal, "without any relative claiming, or thinking of claiming to "their exclusion; and also the numberless instances in "which the crown would have been entitled—no claim "however having been made, in any one instance, by any "one attorney-general." "A marriage between Quakers, "according to their own ceremonies" (says Lord Campbell) "was held valid at nisi prius in an action of ejectment; "and the ruling appears to have been acquiesced in." Actions founded on torts have, to be sure, less weight, because the proofs against a wrong doer are not usually re-

quired to be so strong as in other civil suits. Still it is not to be overlooked, that actions for criminal conversation have been sustained, where the marriage was between Quakers; as in the case mentioned by Mr. Justice Willes in *Harford* v. *Morris*, and also in the case of *Deane* v. *Thomas*, (1 Moo. & Mall. N. P. 361) where Lords Abinger and Brougham were counsel. And again, where the marriage was between Anabaptists, as in *Wolston* v. *Scott*, before Mr. Justice Denison. In these various modes, then, the marriages of Dissenters in general, and of Quakers in particular, though celebrated without the intervention of a person in holy orders, have conferred civil rights, and imposed civil liabilities.

98. Lord Cottenham's remaining remarks on the state of the marriage law before 1753 are slight and brief; but yet a due respect for his Lordship forbids me to pass them by without notice. "We hear," says the noble and learned peer, "of actions by women for breach of promise "of marriage after a contract *de futuro*, and cohabitation; "that is, an action by a *wife* against her husband, for a "breach of a promise to marry, the marriage being by the "supposition complete. It is difficult to conceive how, in "such case, there could be a contract to support the ac- "tion, which would not, with the cohabitation, be a mar- "riage according to the supposed law." So far his Lordship, who here, as in other instances, confounds the spiritual with the civil jurisdiction. With great submission the word "wife" begs the whole question. A woman coming into a Common Law Court to claim damages for such a wrong did not appear there as a wife; nor could the Common Law Court attach that character to her. Possibly she might be held to be a wife by the competent Ecclesiastical Court; but possibly she might not: and the Common Law Court could not tell what might be the result of a trial in a Court of different jurisdiction. She

might not have such proof as an Ecclesiastical Court would require to pronounce her a wife, and yet abundant proof of seduction and perfidy for which a jury might well award her damages. The noble and learned peer is, no doubt, aware that these considerations were well weighed when this species of action at Common Law was first agitated; for judges of high station doubted whether it would lie, there being a remedy in the Court Christian; but they were satisfied, on reflection, that it might, because the suits were *diverso intuitu*, in the one Court for a specific performance, in the other for a compensation in damages; different remedies were adapted to different cases—the injured party might resort to that tribunal, in which, from the evidence that the case afforded, and from the rules and practice in the Court, the chance of success appeared most promising—or after trying the one suit and failing, might resort to the other; as was doue in *Da Costa* v. *Villa Real*, in the Arches, 1733, and at Common Law, 1734 (1 Hag. C. R. 242; 2 Stra. 961.)

99. The last and least confidently urged of these objections is, that "there are Acts respecting marriages of "Dissenters and of persons in the Colonies, which (as "Lord Cottenham thinks) would be *wholly useless* if a "contract could constitute a marriage." This is answered at once by the Lord Chancellor's remarks on the Statute 12 Charles II. c. 33, for confirmation of marriages had during the Commonwealth. Those marriages contained a contract *per verba de præsenti*. "But (says the Lord "Chancellor) if such contracts were not followed by *all* "the consequences of marriages regularly solemnized, the "act was obviously *necessary*." I add, if there was a grave *doubt* whether all the consequences would follow, the acts could not be "wholly useless." Take the case of the marriages celebrated in India prior to 1818, by ordained ministers of the Church of Scotland. Eight eminent

lawyers, though they held that those marriages were binding on the parties, and legal, to various purposes, yet thought it at least doubtful, whether the parties would be "entitled "to administration of each other's goods—or whether the "children of such a marriage would be entitled to inherit "dignities, or lands in England—or to administration of "the personal property of their parents—or whether, in "case of a second marriage, an indictment for bigamy "could be maintained." (Letter to Lord Brougham, App. No. 2). I am humbly of opinion, that to quiet such doubts and to *declare* the law respecting such marriages was not "wholly useless;" but, on the contrary, "highly "expedient:" and so thought the eight distinguished persons who joined in opinion on that occasion: and so thought the two Houses of Parliament, which passed the statute (58 Geo. III. c. 84).

100. I have thus, to the best of my humble ability, and with all due respect for the high rank and station of the noble and learned peer whose opinion I have been reviewing, gone carefully and deliberately through all his arguments relating to "the state of the law *as it existed* "*before* 1753." This is the period to which alone his Lordship declares that "the present inquiry" relates; and to which indeed, with the exception of a few short lines, his whole speech is confined. He says in the opening, "The question is, did a contract of marriage, *per verba de* "*præsenti tempore*, without the intervention of a priest in "holy orders, constitute a valid marriage by the law of "this country, *as it existed before the passing of the Mar-* "*riage Act?*" And in his peroration he says, "We have "to decide in a criminal case, whether by the *common law* "of Ireland, *which is the same as the common law of England*, "the first marriage was a legal marriage." His Lordship having thus excluded all consideration of any change in the law effected by the Act of 1753, or at any time after-

wards, and expressly confined the discussion to the Common Law, it seemed unnecessary to inquire into the effect of any recent statute.

101. However, in the short passage above alluded to, the noble and learned peer mentions the 3rd section of stat. 58 Geo. III. c. 81, (A. D. 1818), by which (as he argues) a marriage in Ireland after a contract *de præsenti* "is *now* indissoluble." I do not very well understand what inference his Lordship would draw from these premises. Perhaps he means, that as the legislature could not intend that there should be two co-existent marriages equally valid, it must have considered the contract to have been *previously* inoperative, if not enforced by a suit to compel celebration. But this is by no means a necessary inference: the legislature may have resolved to render such contracts inoperative for the *future;* or it may have meant to leave their force and effect, except in the point specified, to the other provisions of the law. It is to be observed, that though the Act in question is contained in three short sections, it is one of those heterogeneous pieces of legislation which embrace matters having no sort of connexion; for the two first sections relate to minor executors, and the third alone to contracts of marriage. That section is copied, almost *verbatim,* from the 13th section of the Marriage Act of 1753; but is not accompanied with any general words of annulment like those of the 8th section of the last-mentioned Act; and it probably passed through parliament without exciting much attention to its effect on the general matrimonial law of the country. The Lord Chancellor, it is true, cited the same Act of 1818 in support of his view of the case before the House of Lords; but that view was very different from Lord Cottenham's. The Chancellor did not attempt to shake the doctrines of matrimonial law so long acquiesced in by the great legal oracles of England: and in particular, he paid a just and

honourable deference to Lord Stowell's exposition of those doctrines, neither rejecting it as "uncalled for," nor casting a doubt on it as "indecisive."

102. On the Act of 1818 I offer no opinion. My object in these Observations is, as it was in the Letter to Lord Brougham, to defend the doctrines maintained, seven years before the passing of that Act, by my revered and lamented friend and patron, in a judgment, which the noble and learned Lord Chief Justice of the Queen's Bench truly says "never can be forgotten, or read without the highest "admiration," though "now for the first time repudiated "in England." On the question stated by Lord Cottenham, "whether a contract of marriage *per verba de præ-* "*senti*, without the intervention of a person in holy orders, "did or did not constitute a valid marriage by the law of "this country as it existed before the Marriage Act," Lord Stowell clearly, distinctly, and unequivocally held the affirmative; Lord Cottenham holds the negative, on two main grounds, and on certain subsidiary arguments, both the one and the other of which I have scrupulously examined, and have shown them, as with all due submission I conceive, to be alike inconclusive.

103. His Lordship's main grounds are: first, the Ordinances of King *Eadmund* and Archbishop *Lanfranc*, which he supposes to have continued to be the laws of the Ecclesiastical Courts of this country from the years 940 and 1076 respectively, down (at least) to 1753. In answer to this, I have shown (*a*), that from the middle of the 13th century, and probably earlier, those rude and obscure fragments (for they are no better) not only were not part of the law of those Courts, but it was *morally impossible* that they should have been so held. Secondly, his Lordship relies on what he calls "*Five Tests* of the validity of marriage." In answer to which I have shown, that of the five incidents

(*a*) Sect. 13.

which he specifies, viz. Dower (*b*), Marital right (*c*), Legitimacy (*d*), Coverture (*e*), and Avoidance (*f*), the four first are no decisive tests of the validity of marriage, and the fifth is inconsistent with the principles of Ecclesiastical Law.

104. To the subsidiary arguments, I have answered (always with the same deference to the noble and learned peer) first, that the cases of *Welde*, *Fielding*, and *Payne*, involve no assumption, that a contract *de præsenti* did not constitute a marriage (*g*); secondly, that in the cases of *Jessot* and *Wigmore*, Lord Chief Justice Holt did clearly and sufficiently state (and was right in so doing) that by the ecclesiastical law of England, a contract *per verba de præsenti* was a valid marriage, though it might not entitle the parties to all the civil privileges of a marriage more regularly celebrated (*h*); thirdly, that Lord Cottenham's conclusions from these cases are contradicted by the highest authorities prior to the Marriage Act of 1753 (*i*); fourthly, that the authorities subsequent to that act, and which are in accordance with the preceding, are not to be passed over with that disregard, which Lord Cottenham is inclined to show them; inasmuch as they comprize a long unbroken series of the highest names in our judicial history (*k*); as those illustrious personages were consistent and unwavering in their opinions (*l*); and as they drew their information from the uniform doctrines of text writers in Ecclesiastical Law, and of eminent judges in the Ecclesiastical Courts (*m*); fifthly, that Lord Stowell's language was perfectly decisive, in maintaining the validity, as a marriage, of a contract *de præsenti;* and perfectly consistent, in acknowledging, that if not followed by due solemnization, it was irregular, and subjected the parties to various

(*b*) Sect. 20. (*c*) Sect. 23. (*d*) Sect. 27. (*e*) Sect. 37.
(*f*) Sect. 38. (*g*) Sect. 52. (*h*) Sect. 55. (*i*) Sect. 64.
(*k*) Sect. 68. (*l*) Sect. 71. (*m*) Sect. 72.

penalties, as well spiritual as civil (*n*); sixthly, that those very penalties were unanswerable proofs of the validity of the matrimonial bond, which, however irregularly contracted, was at that time deemed too sacred to be annulled (*o*); seventhly, that a contract *per verba de præsenti* did not give a mere *jus ad rem* but a *jus in re* (*p*); eighthly, that the marriages of Jews were properly governed by the Jewish law (*q*); ninthly, that the marriages of Quakers, like those of all other Dissenters, were protected by the Toleration Act, and to a certain extent conferred on the married couples civil rights, and imposed on them civil liabilities (*r*); tenthly, that in the case of a promise of marriage, followed by cohabitation, there was no collision of principle between the spiritual suit for a specific performance, and the civil suit for a compensation in damages (*s*); and lastly, that the statutes, which declare certain irregular marriages abroad to be valid, are not "useless;" because those marriages, though intrinsically valid, would not, without the statutes, have been available to all purposes in the law (*t*).

105. I trust, it will be found that I have fairly stated, and satisfactorily answered, all the objections, which Lord Cottenham has urged, against the law laid down by Lord Stowell. If those objections appear, upon investigation, to be wholly unfounded, let it be remembered, that the question at issue between these two noble and learned peers is essentially one of ecclesiastical law—that on points directly touching the validity of marriage, that law was, at the period referred to (as Lord Cottenham fully admits), "the law of the country"—and that whilst Lord Cottenham is professionally almost a stranger to that branch of jurisprudence, the venerable judge, from whom he differs, was confessedly "the most learned ecclesiastical lawyer of his age."

(*n*) Sect. 74. (*o*) Sect. 75. (*p*) Sect. 79. (*q*) Sect. 87.
(*r*) Sect. 89. (*s*) Sect. 98. (*t*) Sect 99.

# APPENDIX.

## *Extract from an Opinion of G. S. Holroyd on the Validity of a Marriage at Gibraltar, where the Ceremony was performed by a Person not in Orders.*

It is material, I think, to consider in this case what the law of England was previous to the Marriage Act, and what it would be now independently of that statute. Though by the Canons of 1603, and by several regulations made by statute, marriages were to be celebrated in facie ecclesiæ and in canonical hours, and in the manner prescribed by the ritual of the Church of England, and by licence, or by publication of banns, or when either party is a minor, either by consent of parents or guardians, or by publication of banns without dissent, the priest performing the marriage ceremony without due observance of all or any of those regulations, and in some instances the laity, parties thereto, were punishable, either by suspension, ecclesiastical censures, or by penalties (see Burn's Ecclesiastical Law, 6th edit. 465, &c.), *yet the marriage was not void.* A marriage, not in facie ecclesiæ, but in a chamber, was a valid marriage, even to entitle the wife to dower, in which case the validity of marriage, if contracted in England, was determined by the certificate of the bishop, given after a trial in the Spiritual Court. (See Perkins, s. 306, p. 135; 2 H. B. L. 155; 2 Salk. 437; 1 Lev. 41.) So a marriage at an alehouse at midnight by a parson in sacred orders, which was not in facie ecclesiæ, but out of canonical hours, was holden a valid marriage. (See 1 Sid. 64; S. C. 1 Keb. 188.) So where a man who had taken orders according to the church of England in former times, and ejected in 1663, did contract the parties in these words:—"I, A. B. take thee, B. C.. for my espoused, "betrothed, wedded wife, and will be thy espoused, betrothed, and "wedded husband till death," the parson speaking those words, the man repeating them after him, and the woman the like (mutatis mutandis), and no ring, according to the Common Prayer Book, but a cohabitation as man and wife for ten years afterwards, Lord Chief Justice Pemberton inclined to think it a good marriage, there being words of contract de præsenti repeated after a parson in orders. (See Show. 300.) So the Canons and the Statutes regulating marriages previous to the Marriage Act, which are abstracted in Burn's Ecclesiastical Law, in the place above cited, impose either suspension or penalties on parsons, or the parties, for marrying without consent of parents or guardians where there are minors, and whether so or not, then without banns or licence, but they either take it for granted that the marriage was valid, or leave that as it was before. (See also 2 Stra. 1056; 2 Atk. 650.)

I have not been able, notwithstanding a diligent search, to find any case, *except the case of Haydon* v. *Gould*, 1 Salk. 119, where it has been directly decided that the marriage ceremony performed between a man and a woman by a person not in orders was or was not valid, unless the

decisions that a contract per verba de præsenti is the marriage itself are so considered. The question was argued in a settlement case before Lord Chief Justice Lee and the other judges of the Court of King's Bench, and was thought by them to be a question of great moment, but they did not decide it. (See Burr. Settlement Cases, p. 232.)

But, upon the best consideration I can give the case, it appears to me that *by the law of England previously to* or independently of *the Marriage Act*, which does not affect this case, the present marriage, unless so far as the law of Gibraltar, where it was celebrated, and which law must prevail in this case, may differ from the law of England, and invalidate it, *would be deemed a valid marriage.*

A contract of marriage per verba de præsenti has been frequently said to be, and was, I think, *marriage* by the law *previous to the Marriage Act*, and is so now in places *where the Marriage Act is not in force*, but where the rest of the law of England relating to marriage does in general prevail. It was so much the marriage itself, if followed by cohabitation and consummation, that it avoided any subsequent marriage, however solemnly performed in facie ecclesiæ, between another person and either of the parties, living the other, and was so until the statute 32 Hen. VIII. c. 8, even without such cohabitation and consummation. (See 2 Salk. 437, 438; Swinburne, Of Espousals, 74; 6 Mod. 155; 1 T. R. 99; Peake's Cases at Nisi Prius, 232.) It is true that in Perkins, in the place above cited, it is said that if a man seised in fee make a contract with I. S., and he die before the marriage solemnized between them, she shall not have dower, for she never was his wife. That is perfectly correct, if he is understood as speaking of a mere contract of marriage, that is, a contract per verba de futuro, to marry at a subsequent time, and I think he must be considered as so speaking, for in that case until solemnization it is no marriage, and she is not his wife. He is not to be considered there as speaking of a contract of marriage per verba de præsenti, and such a contract per verba de præsenti is contained in the marriage ceremony of the church of England, whether that ceremony be performed by or be repeated by the parties after a person who is a minister of that church or not. *Such a contract is not merely a contract of marriage*, but is *more*, namely, *ipsum matrimonium*. It may be true, as Lord Holt says, in 6 Mod. 155, that if the parties cohabited together after a contract per verba de præsenti, and before the regular celebration of it in facie ecclesiæ, they were punishable by ecclesiastical censures, but that was not because the marriage was invalid, but because in the celebration of it, had contrary to the canons, they neglected to perform the ceremonials required to be performed by the church. In Wigmore's case, 2 Salk. 438, in the fifth year of Queen Anne, Lord Holt appears to have held a marriage, where the husband was an Anabaptist, solemnized according to the forms of their own religion, a good marriage. It is not stated whether the person performing the marriage ceremony was a priest in holy orders; probably he was not.

In the ninth of Queen Anne, however, the Ecclesiastical Court, in a sentence confirmed by the Delegates, repealed letters of administration granted to Haydon as the husband of Rebecca, deceased; for it was said that Haydon, demanding a right due to him as husband, must, by the ecclesiastical law, prove himself a husband according to that law to entitle himself to the administration. Rebecca and Haydon were Sabbatarians, and married by one of their ministers in a Sabbatarian congregation, and they used the form of the Common Prayer, except the ring, and lived together as man and wife as long as the woman lived, viz. seven

years; but the minister was a mere layman, and not in orders. In this case *it does not distinctly appear that they held the marriage void;* for they held that the wife and the issue of the marriage, who were in no fault (though the wife appears to me to have been in that respect in the same situation with the husband), might entitle themselves by such *marriage* to a temporal right. The report of the decision is not very clear or intelligible, but it seems to me most probable that, without declaring the marriage void, it went entirely upon this, that as the administration was a right due to him as husband by the ecclesiastical law, they would not grant the administration to him, as he had not complied with the forms of that law, which the church prescribed, in the solemnization of his marriage. I think that this cannot be taken as contrary to the other cases, as a decision, further than this; notwithstanding the observation at the end of the case, that the constant form of pleading marriage is, that it was "per presbyterum sacris ordinibus constitutum," which, on reference to the Books of Entries, I find not to have been the form of pleading in our law. (*Haydon* v. *Gould*, 1 Salk. 119.) Marriages, too, in England, by priests of the Church of Rome, have been held good, even when such priests were not tolerated in England. (See 1 East's Crown Law, 469, 470; 2 Burn's Eccles. Law, 473.)

G. S. HOLROYD.

*Gray's Inn,*
11*th December*, 1804.

London: printed by C. Roworth and Sons, Bell Yard, Temple Bar.